SUPREME COURT, U. S.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED JANUARY 3, 1949.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

Statement Under Rule 15, Subdivision (b)

This action was commenced on the 22d day of April, 1946. The names of the original parties are James E. Markham, Alien Property Custodian, plaintiff, and Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, and Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., defendants.

Statement Under Rule 15, Subdivision (b)

There has been no change of parties to the action except
4 that Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, was substituted as plaintiff in place and stead of James E. Markham, Alien Property Custodian, the original plaintiff.

The complaint in the action was filed on the 22d day of April, 1946. The answer of defendant Henry M. Propper, as receiver, etc. was filed on the 13th day of May, 1946. The answer of the defendant Deems Taylor, as President, etc., was filed on the 7th day of October, 1946.

No defendant was arrested, or bail taken; no property was attached or arrested on account of the proceedings
5 hereunder.

No trial was had herein. The final judgment appealed from was entered as the result of a decision by Coxe, U. S. D. J., rendered the 21st day of January, 1947, upon (1) a motion by the defendant Henry M. Propper, as receiver, as aforesaid, for judgment on the pleadings under Subdivision "c" of Rule 12 of the Rules of Civil Procedure, or for summary judgment under Rule 56 of the Rules of Civil Procedure, dismissing count "two" of the complaint herein; and (2), a cross-motion by the plaintiff for judgment on the pleadings, or for summary judgment in favor of the plaintiff and against said defendant receiver on
6 count "two" of the complaint.

No question was referred to a master or referee; and no result of the proceedings, and no report or reports on such reference exists.

The decision of Coxe, U. S. D. J., which was the basis of the final judgment appealed from, is dated the 21st day of January, 1947; the final judgment appealed from is dated the 10th day of February, 1947 and entered on the 11th day of February, 1947. This appeal was taken on February 28, 1947.

Summons

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File Number: Civ. 35-581

JAMES E. MARKHAM,
Alien Property Custodian,

Plaintiff,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an Unincorporated Association of more than seven members,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendants.

To the above-named Defendant:

You are hereby summoned and required to serve upon John F. X. McGohey United States Attorney for the Southern District of New York, plaintiff's attorney, whose address is United States Courthouse, Foley Square, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to

do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL
Clerk of the Court

(Seal of the U. S. District Court)

Dated April 22, 1946

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

Complaint

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COUNT 1.

1. Jurisdiction is founded on Section 24(1) of the Judicial Code, as amended, 28 U. S. C. 41(1), and on Section 17 of the Trading with the Enemy Act, 50 U. S. C., Appendix, 17.

2. The defendant, American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, is an unincorporated association, consisting of more than seven members, with principal place of business in the city, county and state of New York, and is constituted for the purpose of granting licenses and collecting royalties for the public performance of the musical works of its members and allotting and distributing such royalties. At the time of the commencement of this action, Deems Taylor was and still is president of ASCAP.

3. At all times hereinafter mentioned, La Societe des auteurs, Compositeurs et Editeurs de Musique, hereinafter referred to as SACEM, was and still is an unincorporated association existing under the laws of the Republic of France, with principal place of business at Paris, France, and is constituted for the purpose of granting licenses and

collecting royalties for the public performance of the musi-
16 cal works of its members and of allotting and distributing such royalties among its members.

4. On or about June 19, 1933 ASCAP and SACEM entered into an agreement in writing wherein and whereby SACEM granted to ASCAP the exclusive right to license in the United States, Alaska, Puerto Rico, Philippine Islands, Virgin Islands, Hawaii, and its colonies and possessions, the non-dramatic public performance for profit of certain musical works, the performing rights of which then were, or which during the term of the agreement
17 might be, vested in or controlled by SACEM, and ASCAP agreed to require of and collect from its licensees payment for such public performance, and, on or before the 30th day of September succeeding the close of each calendar year during the term of said agreement, to account to SACEM for collections made for the preceding calendar year and to remit to SACEM the proceeds of such collections after deduction of its expenses, commissions, and payment, in accordance with the terms of the agreement. A copy of said agreement is attached as Exhibit "A" hereto.

5. Said agreement by its terms became effective Janu-
18 ary 1, 1933 and at all times since, material to this action, has remained in full force and effect. At all times SACEM has duly performed its obligations under the terms of said agreement.

6. Commencing January 1, 1933 and at all times thereafter, pursuant to said agreement, the defendant ASCAP has licensed the performance of musical works, vested in or controlled by SACEM, has received and collected license

fees for such performances, and has deducted and retained its expenses, commissions, and payment, but has failed and refused to deliver to SACEM the net sum of $349,755.35 collected during the period January 1, 1937 to September 4, 1943.

7. By Vesting Order 2097, executed September 4, 1943, filed with the Division of the Federal Register December 4, 1943, and published in 8 Federal Register 16463 on December 7, 1943, the plaintiff vested in himself as Alien Property Custodian all rights and interest of SACEM in and to the contract of June 19, 1933, and all right, title, interest, and claim in and to the said sums so collected and withheld by ASCAP as set out herein, all in compliance with law.

8. On September 11, 1943 plaintiff made written demand on the defendant ASCAP for delivery of the said license fees collected and withheld by it. In response to said demand, ASCAP has delivered or is delivering to plaintiff the net license fees collected by it subsequent to September 4, 1943 and has also delivered to the plaintiff a portion of the fees so collected and withheld by it prior to September 4, 1943 in the amount of $135,976.91, but at all times has neglected and refused to deliver to the plaintiff the remainder of said fees so collected by it for SACEM prior to September 4, 1943 in the amount of $243,778.44, all of which is due, owing, and unpaid.

COUNT 2.

1. Paragraph 1 of Count 1 is incorporated by reference.

2. Paragraph 2 of Count 1 is incorporated by reference.

22 3. The defendant, Henry M. Propper, is receiver of the property and assets of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as AKM, in the state of New York, having been appointed as such receiver by the Supreme Court of New York in and for the County of New York in an action entitled Franz Sobotka v. Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commenced June 9, 1941 and bearing file number 12719/1941. As such receiver the said Henry M. Propper claims to have title to the moneys which are the subject matter of this count.

23 4. At all times material to this action up to and including December 31, 1938, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (State-approved Society of Authors, Composers and Music Publishers), hereinafter referred to as AKM, was a registered cooperative society with limited liability, organized and existing under the laws of the Republic of Austria and was constituted for the purpose of granting licenses and collecting royalties for the public performance of the musical works of its members and of allotting and distributing such royalties among its members.

24 5. On or about January 1, 1933 the defendant ASCAP and AKM entered into an agreement in writing wherein and whereby AKM granted to ASCAP the exclusive right to license in the United States, Alaska, Puerto Rico, Philippine Islands, Virgin Islands, Hawaii, and its colonies and possessions, the non-dramatic public performance for profit of certain musical works, the performing rights of which then were or which during the term of the agreement might be, vested in or controlled by AKM, and ASCAP agreed to require of and collect from its licensees payment for such

public performance; and, on or before the 30th day of September succeeding the close of each calendar year during the term of said agreement, to account to AKM for collections made for the preceding calendar year and to remit to AKM the proceeds of such collections after deduction of its expenses, commissions, and payment, in accordance with the terms of the agreement. A copy of said agreement is attached as Exhibit "B" hereto.

6. Said agreement by its terms became effective January 1, 1933 and remained in full force and effect at all times subsequent to that date until December 31, 1938. At all times, AKM duly performed its obligations under the terms of said agreement.

7. At all times between January 1, 1933 and December 31, 1938 ASCAP, pursuant to the terms of said agreement, licensed in the United States and its territories the performance of musical works vested in or controlled by AKM, received and collected license fees for such performances and deducted and retained its expenses, commissions, and payment for such licensing and collection, but failed and neglected to remit to AKM the net sum of $62,809.85 collected by ASCAP during said period.

8. On June 9, 1941, one Franz Sobotka, a national of Austria, filed in the Supreme Court of New York in and for the County of New York, his petition alleging that the said AKM had been liquidated and had assets within the State of New York and praying for the appointment of a receiver of such property pursuant to Sec. 977(b) of the Civil Practice Act of New York. On June 12, 1941, pursuant to said petition, the defendant, Henry M. Propper,

was appointed temporary receiver of the property and
28 assets of AKM within the State of New York, and on September 29, 1941, upon default of AKM, final judgment was entered against it in said action and Propper's appointment as receiver was made permanent. By reason of his appointment as receiver of the property and assets within the State of New York of AKM, the defendant Propper claims to have acquired title to the license fees of AKM collected and withheld by ASCAP which are the subject of this count. On July 9, 1941 the defendant, Propper, served on ASCAP written notice of his appointment as temporary receiver together with a demand for delivery
29 of the funds of AKM held by ASCAP and on July 29, 1941, the said Propper, as temporary receiver, commenced an action against ASCAP to recover the funds so held by it, which action is still pending in the courts of the State of New York but has not proceeded to trial on its merits.

9. By Vesting Order No. 2097 executed September 4, 1943, filed with the Division of the Federal Register on December 4, 1943 and published in 8 Federal Register 16463 on December 7, 1943, the plaintiff vested in himself as Alien Property Custodian all right, title, interest, and claim in and to the said license fees so collected and with-
30 held by ASCAP as set out herein, all in compliance with law.

10. On September 11, 1943 the plaintiff made written demand on the defendant ASCAP for delivery of the said fees so collected and withheld by it, but ASCAP at all times has refused and neglected to deliver said fees or any part thereof to the plaintiff.

11. The plaintiff, by his Vesting Order No. 2097, has acquired full and complete title to the license fees collected by ASCAP for AKM which are the subject matter of this count, and the defendant, Henry M. Propper, receiver, has no right, title, or interest therein superior to the rights of this plaintiff. 31

12. At the time of the appointment of the defendant Propper as receiver of the property and assets of AKM within the State of New York, and at all times since, material to this action, Executive Order 8389 of April 10, 1940 (5 Fed. Reg. 1400, 1677, 2279, 2586, 2667, 4062, 6 Fed. Reg. 1285, 1443, 1622, 2187, 2897, 3715, 6348, 6785), has been and is in full force and effect and has been and is applicable to AKM and to the property which is the subject of this count. The purported and attempted acquisition of title by the defendant Propper was a transaction involving property in which a foreign national had an interest within the purview of Executive Order No. 8389 and was in violation of and was prohibited by the terms of said Executive Order No. 8389 and was and is null and void and of no force and effect. The defendant Propper, by reason of his appointment as receiver, acquired no title to nor interest in the property which is the subject matter of this count superior to the rights acquired by this plaintiff pursuant to his Vesting Order No. 2097. 32 33

COUNT 3.

1. Paragraph 1 of Count 1 is incorporated by reference.

2. Paragraph 2 of Count 1 is incorporated by reference.

34 3. At all times hereinafter mentioned, material to this action, Staatlich Genehmigte Gesellschaft Zur Verwertung Musikalischer Urheberrechte (State-approved Society for the Exploitation of Musical Copyrights), hereinafter referred to as STAGMA, was a public governmental corporation of the German government, with principal place of business at Berlin, Germany, and was constituted for the purpose of granting licenses and collecting royalties for the public performance of the musical works of its members and of allotting and distributing such royalties among its members.

35 4. On or about January 1, 1933, ASCAP and Genossenschaft Zur Verwertung Musikalischer Auffuhrungsrechte (Society for the Exploitation of Music Performance Rights), hereinafter referred to as GEMA, and Gennossenschaft Deutscher Tonsetzer (Society of German Composers), hereinafter referred to as GDT, both of Berlin, Germany, entered into an agreement in writing wherein and whereby GEMA and GDT granted to ASCAP the exclusive right to license in the United States, Alaska, Puerto Rico, Philippine Islands, Virgin Islands, Hawaii, and its colonies and possessions, the non-dramatic performance for profit of certain musical works, the performing rights
36 of which then were, or during the term of the agreement might be, vested in or controlled by GEMA or GDT, and ASCAP agreed to require of and collect from its licensees payment for such public performance, and, on or before the 30th day of September succeeding the close of each calendar year during the term of said agreement to account to GEMA and GDT for collections made for the preceding calendar year and to remit the proceeds of such collection

to GEMA and GDT, after deduction of its expenses, commissions, and payment, in accordance with the terms of the agreement. A copy of said agreement is attached as Exhibit "C" hereto. 37

5. Said agreement by its terms became effective January 1, 1933. Thereafter, pursuant to laws and decrees of the German government of July 4, 1933 and February 15, 1934, the right to license and contract for the public performance of musical works was placed under the control of the Reichminister for Popular Enlightenment and Propaganda, and GEMA and GDT were dissolved and were replaced by STAGMA, which succeeded to the property, contract rights, and members of GEMA and GDT, and was declared by decree of the German government to be the exclusive agency to conduct commercial negotiations for the public performance of musical works. Upon the occurrence of such events the contract between ASCAP and GEMA and GDT was adopted and continued by ASCAP and STAGMA, and at all times since has remained in full force and effect between ASCAP and STAGMA. At all times since, material to this action, STAGMA has fully performed its obligations under the terms of said agreement. 38

6. Commencing January 1, 1933 and at all times subsequent thereto ASCAP has licensed in the United States, its territories and possessions, the performance of musical works vested in and controlled by STAGMA, has received and collected license fees for such performances, and has deducted and retained its expenses, commissions, and payment for such licensing and collection, but has failed and 39

refused to deliver to STAGMA the net sum of $116,371.59
40 collected during the period January 1, 1937 to September 4, 1943.

7. By Vesting Order No. 2097 executed September 4, 1943, filed with the Division of the Federal Register on December 4, 1943 and published in 8 Federal Register 16463 on December 7, 1943, the plaintiff vested in himself as Alien Property Custodian all the rights and interest of STAGMA in and to said contract of January 1, 1933, and all right, title, interest, and claim in and to the said sums so collected and withheld by ASCAP as set out herein, all
41 in compliance with law.

8. On September 11, 1943 the plaintiff made written demand on the defendant ASCAP for delivery of the license fees so collected and withheld by it. Pursuant to said demand ASCAP has delivered or is delivering to the plaintiff the net license fees collected by it on behalf of STAGMA subsequent to September 4, 1943, but at all times has refused and neglected to deliver to the plaintiff the fees so collected by it for the period January 1, 1937 to September 4, 1943 in the total sum of $116,371.59, all of which is due, owing, and unpaid.

42

WHEREFORE plaintiff demands:

1. That the court find and adjudge that the plaintiff, by his Vesting Order No. 2097, executed September 4, 1943, filed with the Division of the Federal Register December 4, 1943, and published in 8 Federal Register 16463 on December 7, 1943, has acquired full and complete title to the license fees and moneys collected for SACEM, AKM, and

STAGMA by the defendant ASCAP and withheld by it; that the defendant Henry M. Propper, receiver of the property and assets of AKM in the State of New York, has no title to nor interest in said assets of AKM superior to that of this plaintiff; and that the purported acquisition of title by the said Henry M. Propper, receiver, is null and void as against this plaintiff. 43

2. That the plaintiff have judgment against the defendant ASCAP in the sum of $392,959.88, together with interest and costs.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff 44

By: THOMAS G. DONLAN,

Thomas G. Donlan,
Assistant United States Attorney.
Office and Post Office Address:
United States Court House
Foley Square
New York, N. Y.

45

EXHIBIT B ANNEXED TO COMPLAINT

AGREEMENT made the first day of January, 1933, be-
46 tween

GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER (AKM), of Baumannstrasse 8, Wien, III, Austria, hereinafter designated as "AKM", and

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, of 1501 Broadway, New York, N. Y., U. S. A., hereinafter designated as "ASCAP", as follows:

I

47 Subject to the restrictions provided in Clauses II, Paragraph B, III, IX and X of this agreement AKM warrants and represents that it has acquired, and neither assigned to anybody else nor released, and agrees that it will during the entire term of this agreement and any extension thereof for the purposes hereinafter mentioned neither assign to anybody else nor release the exclusive right to license in the UNITED STATES OF AMERICA, ALASKA, PUERTO RICO, PHILIPPINE ISLANDS, VIRGIN ISLANDS, HAWAII, and its Colonies and Possessions, non-dramatic public performances of the musical works copyrighted by its respective members, a list of whom is
48 hereto attached marked "Schedule I" and made a part hereof.

II

A. AKM hereby grants to ASCAP the sole and exclusive right to license in the above territory non-dramatic public performances for profit of musical works the performing rights of which are now or may, during the term hereof, be vested in or controlled by it.

B. It is therefore understood and agreed, that there shall be excluded from the operation of this agreement all dramatico-musical works, musical plays, musical comedies, operas, operettas as such, symphonic works and all other categories of works the public performance of which are considered in the United States of America as involving "grand rights"; it being understood however that the right to license performances of separate musical compositions, fragments or selections forming a part of such works, in non-dramatic, non-stage renditions are included under the terms hereof in accordance with Paragraph A. 49

C. AKM is within sixty (60) days from the execution of this agreement to furnish ASCAP with a complete list showing the title, name of the composer, author (if any) and publisher, of each and every copyrighted symphonic work except those referred to in Clause III intended to be excluded from the operation of this agreement. Moreover AKM agrees from time to time hereafter during the term hereof to furnish ASCAP the same information in relation to each and every new symphonic work copyrighted by any of its members which should be excluded from the operation of this agreement. 50

III 51

It is understood that there shall be excluded from the operation of this agreement and of Clause II next above all musical compositions copyrighted by Universal-Edition, Vienna, and subsidiary catalogs of the firms Otto Maass, Vienna, Albert J. Gutmann, Vienna, Wiener Operetten-Verlag G. m. b. H., Vienna and Wiener Philharmonischer Verlag, Vienna, as well as Harmonie-Verlag, G. m. b. H., Berlin and the C. F. Adler Edition G. m. b. H. Berlin.

Exhibit B Annexed to Complaint

IV

52 With the restrictions provided in Clauses II Paragraph B. IX and X of this agreement ASCAP warrants and represents that it has acquired and neither assigned to anybody else nor released and agrees that it will during the entire term of this agreement and any extension thereof for the purposes hereinafter mentioned neither assign to anybody else nor release the exclusive right to license in the REPUBLIC OF AUSTRIA non-dramatic public performances of the musical works of its respective members, a list of whom are hereto attached marked "Schedule B" 53 and made a part hereof.

ASCAP hereby grants to AKM the sole and exclusive right to license in the REPUBLIC OF AUSTRIA the non-dramatic rendition in public performances of musical works the performing rights of which are now or may during the term hereof be vested in or controlled by ASCAP.

V

The terms "public performance for profit" and "public performance" hereinbefore used, shall be construed to mean 54 vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including performance by radio broadcasting stations, by telephony and/or "Wired Wireless"; and/or reproductions of non-dramatic renditions by means of devices for reproducing soundrecorded in synchronization or timed relation with motion pictures, provided however, that in the case of dramatico-musical works, musical plays, operas, operettas, musical comedies and works of a similar character, such

performances shall be limited to the separate numbers, fragments or arrangements, melodies or selections forming a part or parts thereof, and shall not include the right of public performance of such works in their entirety or of any part thereof as stage plays, or as a part of stage plays, all of which rights, including all other rights not in this agreement expressly enumerated, are hereby reserved and retained to their members by ASCAP and AKM respectively, and by the respective composers, authors and publishers of such musical works. 55

VI

56

Each of the parties hereto agrees to require of and collect from its licensees, for the public performance of the musical works referred to in Clauses II and IV hereof, payment therefor upon the same basis and in the same manner as is now in accordance with and to the extent of the respective copyright laws in force and effect between each Society and its respective licensees with respect to the musical works referred to in Clauses II and IV hereof, and that each Society will account for and pay over to the other such monies in respect of the public performance of such musical works as is hereinafter provided in accordance with its respective statutes. 57

VII

A. Each of the parties hereto shall account to the other for each calendar year during the term hereof on or before each 30th September succeeding the close thereof.

B. Such accountings shall be made by the respective parties, each to the other in accordance with their respec-

tive statutes and all accountings shall be made in as com-
58 plete detail as may be practicable under their respective systems of operation. Distributable sums under such accountings shall be subject to deduction only and solely of such amount as may be assessed against them on account of taxes payable to municipal, state and federal governments.

Under any and all circumstances however amounts accruing to the credit of composers, authors and publishers of every party shall be paid directly to the Society of which they are members and shall not in any case be diverted for
59 any reason whatever to the credit of any publisher-member of the accounting Society.

VIII

A. ASCAP agrees during the term hereof to use its best endeavors to gather daily data covering completely the musical programs as rendered by the two principal broadcasting networks in the U. S. A. (National Broadcasting Company and Columbia Broadcasting System respectively, or their successors), together with similar data regarding the musical programs rendered by a selected number of
60 independent broadcasting stations not affiliated with either of said networks but located in various sections throughout the entire country.

B. From such program data, as rendered by the said networks and stations, ASCAP undertakes to prepare semiannually and furnish to AKM a summary which shall show the total number of broadcast performances of works identifiable in such programs as from the repertoire of AKM.

Exhibit B Annexed to Complaint

C. There shall for every identifiable copyrighted work listed on the programs gathered in accordance with Paragraph A hereof be given to each party interested due credit for each performance. There shall for every identifiable copyrighted arrangement of a non-copyrighted work be given to the copyright owner one-half the amount of credit which is credited to works under original copyright. Parties interested are exclusively publishers. Credits in respect of works shall be entered to the respective accounts as follows: 61

1. The repertoire of ASCAP.

2. The repertoire of each foreign performing right society with which ASCAP may have reciprocal relations or act for it as agent. 62

3. The repertoire of each foreign country with which ASCAP may have no relationship.

4. Works not identifiable with any of the above mentioned repertoires.

Points in respect of the works referred to in subparagraph E hereof shall be divided as per the mode of distribution stipulated in subparagraph E-a and b hereafter. 63

D. From the total number of such points there shall be computed the proportion thereof contributed by the repertoire of AKM and the amount due to AKM from ASCAP each year during the term hereof shall be exactly in proportion as the number of their points in relations to the total bears to the total distributable net revenue of ASCAP during the same period.

Exhibit B Annexed to Complaint

64 E. Where a member of AKM has assigned the U. S. A. copyright in a work to an American publisher, it is agreed as follows:

a. If in the contract conveying such work no reservation was made by the conveying member of AKM of any interest in the petits droits in such event the publisher's share shall be credited to the ASCAP member. If however any such reservation is made the publisher's share of any such credits shall be distributed in accordance therewith. In no case shall the share of the writer(s) however be diminished.

65 b. In case an agreement had been made with regard to the distribution of the performing rights ASCAP shall account to AKM in accordance with this agreement, provided however, that such agreement has been ratified by each of the societies.

c. If the parties originally interested (composer, author and publisher) are members of different societies, the amount accruing to the credit of each of these parties shall be paid directly to the respective societies.

66 F. If at any time during the term of this agreement ASCAP shall be unable to secure such daily data as is described in Paragraph A hereof, it shall promptly notify AKM to that effect whereupon AKM may terminate this agreement immediately. For the period up to the date of termination ASCAP shall account to AKM in accordance with the formula provided in subparagraphs C and D hereof to the extent that such data has been obtained. It is understood however, that even in the case of such termina-

tion of this agreement AKM shall represent ASCAP in Austria up to the end of the then current year and ASCAP shall represent AKM in the territory in which it functions for a similar period. From such termination and for the balance of any period during which AKM shall represent ASCAP in Austria, ASCAP shall pay to AKM a sum at the same rate as had been determined to be AKM'S participation during the period in which ASCAP received such daily data. 67

G. Supplemental to and in support of the data prepared in accordance with subparagraphs A, B and C hereof, there shall also be dispatched all the original programs from which the data contained in the statements was compiled. AKM shall be entitled to retain possession of such original programs for a period of not less than thirty days from the receipt thereof, and upon request of ASCAP shall then forward the same complete as received, carrying charges prepaid, as may be directed by ASCAP. 68

H. Inasmuch as ASCAP will receive such original programs in strict confidence from the sources, and will covenant that no disclosure of the contents thereof shall be made to any copyright owner whose works are not embraced under the licenses issued by ASCAP, it is of the essence of this agreement, and AKM agrees, that they will not divulge or expose the contents of such original programs to any but their members and then permit only a personal inspection, and that under no circumstances will they permit any copies thereof or of any of the particulars thereof to be made and removed from their files and premises. 69

Exhibit B Annexed to Complaint

IX

70 Each of the parties hereto is to have the right without effect upon the continuance of this agreement to notify the other of the withdrawal of the entire repertoire of any individual member of either party solely and only in case of the discontinuance under the statutes of the particular society of the membership which controls the withdrawn repertoire. Moreover, it is to be the obligation of each party hereto to notify promptly the other party of each and every such discontinuance of a membership which controls a repertoire or any part thereof.

71

X

Each of the parties hereto grants to the other the rights and licenses set forth in Clauses II and IV hereof, subject always, however, to any right of the author, composer or publisher of any musical work to remove any musical work from the repertory of such respective party and/or to revoke, modify or limit any performing right which he or it may have granted to such party, to the extent to which any such composer, author or publisher may have the right so to do in accordance with the statutes and rules of the 72 respective society, and in the event of any such removal, revocation, modification or limitation each of the parties hereto shall give to the other immediate notice thereof.

XI

This contract is declared to be personal with respect to each of the parties hereto and neither party shall assign

the same or any rights therein granted or arising therefrom, without the written consent of the other party first had and obtained, except insofar as each party shall have the right to issue licenses for the giving of public performances of the musical works contained in the repertoire of the other party. Nor shall this contract be deemed to be assignable by operation of law, devolution or legal proceedings. 73

XII

Each of the parties hereto hereby irrevocably during the term of this agreement authorizes, empowers and vests in the other party the right, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work coming within the purview of this agreement to institute and prosecute actions to retain and recover damages for the infringement or violation of the rights granted to the grantee under this contract, and to release, compromise or refer to arbitration, in the grantee's discretion, any and all actions in the same manner and to the same extent and to all intents and purposes as the grantor and/or the owners of the copyright of such musical work might or could do. And each of the parties hereto hereby makes, constitutes and appoints the other party its true and lawful attorney irrevocably during the term of this agreement, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work to do all acts, take all proceeding and execute, acknowledge and deliver any and all instruments and documents that may be necessary, proper or expedient and recover damages, under the copyright of 74 75

such musical works or otherwise, for the infringement or
76 other violation of the rights hereby granted in such works, and to release, compromise and refer to arbitration any such proceedings or actions or to make any other dispositions of differences in relation to the premises.

XIII

Each party hereto shall supply the other as far as possible with any particulars relating to the musical works in their respective repertoires which may be deemed necessary in their mutual interests.

77

XIV

Each of the parties hereto agrees, during the term hereof, to execute, acknowledge and deliver to the other party in as far as possible such assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient by such party to enable it to exercise and enforce in its own name, or otherwise, all the rights, remedies and privileges granted to it under this contract. The relative costs will be borne by the Society which calls for these documents.

78

XV

Each of the parties hereto agrees that it will not accept into membership any composer, author or publisher, who is a member of the other Society at the time when this agreement is made or who shall become a member of the other Society during the term hereof and who has granted

as to ASCAP his rights also for the territory named in Clause IV hereof, and as to AKM the territory named in 79
Clause I hereof, unless the other party shall consent thereto in writing. That it will not represent in any manner, during the term hereof, any other organization or Society resident in the said territories respectively having purposes or objects similar to those of either of the parties hereto.

XVI

Each of the parties hereto shall have the right to appoint in writing a representative, to take up in its behalf 80
and examine into, during customary business hours, any matter arising in respect of the relations covered by this agreement.

XVII

This agreement shall be effective as of the 1st January, 1933, and shall continue indefinitely thereafter subject to the right of either party by written notice served upon the other before the 30th day of June of any year to terminate the agreement as at the end of the then current year. In the event of any such termination by either party 81
hereto, the parties shall each account to the other in full and according to the terms hereof covering all operations for that year.

Exhibit B Annexed to Complaint

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed by their respective duly authorized officers and their respective seals hereunto affixed the day and year first above written.

GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER (AKM)
GESELLSCHAFT
DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER (A.K.M.)

registrierte Geno schaft mit illegible

By Illegible

By Illegible

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

By GENE BUCK
Gene Buck, President.

Answer of Defendant Henry M. Propper, etc.

DISTRICT COURT OF THE UNITED STATES, 85

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE]

The defendant, Henry M. Propper, as Receiver as aforesaid, by his attorney, A. Walter Socolow, answering Count 2 of the complaint herein, alleges: 86

I: Denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs marked and designated as "9" and "10" of said Count in said complaint.

II: Denies each and every allegation contained in paragraphs marked and designated as "11" and "12" of said Count of said complaint.

III: Admits each and every allegation contained in paragraphs marked and designated as "1", "2", "3", "4", "5", "6", "7" and "8" of said Count in said complaint, but further alleges that defendant ASCAP failed and neglected to remit to A. K. M. or to turn over to it other sums and property in addition to the sum alleged in paragraph "7" of said Count in said complaint. 87

88 *Said Defendant, Further Answering Count 2 and as and for a First, Separate and Distinct Defense Thereto, Alleges:*

IV: That it appears upon the face of Count 2 of said complaint that the same does not state facts sufficient to constitute a cause of action.

Said Defendant, Further Answering Count 2 in Said Complaint and as and for a Second, Separate and Distinct Defense Thereto, Alleges:

89 V: That it appears upon the face of said Count in said complaint that the Court has no jurisdiction of this action.

Said Defendant, Further Answering Count 2 in Said Complaint and as a Third Separate and Distinct Defense Thereto Alleges:

VI: That at the time of the appointment of defendant as Temporary Receiver, as hereinafter alleged, and for a considerable time prior thereto, said A. K. M. had assets within the State of New York, including the indebtedness due it from the defendant ASCAP referred to in said Count 2 of the complaint herein.

90

VII: That at the time of the appointment of defendant Henry M. Propper as Receiver, as hereinafter alleged, and for a considerable time prior and subsequent thereto, there was and still is in full force and effect in the State of New York a general statute known as Section 977-b of the Civil Practice Act of the State of New York, originally enacted by laws of 1936, Chapter 917 of the State of New York,

effective June 8, 1936, as amended by laws of 1938, Chapter 604 of the State of New York, effective April 9, 1938 and as further amended by laws of 1941, Chapter 926 of the Laws of the State of New York, effective May 1, 1941, relative to receivers to liquidate the local assets of foreign corporations, a copy of which statute, as amended as aforesaid and as existing at the time of the appointment of said defendant Henry M. Propper as Receiver, and as continued thereafter and still continues, is hereto annexed and made part hereof and marked "Exhibit A". 91

VIII: That on or about the 9th day of June, 1941, while said statute was in full force and effect in said State of New York, one Franz Sobotka, then a resident of the State of New York within the United States, commenced an action in the Supreme Court of the State of New York, County of New York, against the said A. K. M., the foreign corporation referred to in paragraph "4" of Count 2 of the complaint herein, alleging that he is a stockholder and creditor of said A. K. M., that the said A. K. M. had been liquidated and ceased to do business and other facts sufficient to give to the Supreme Court of the State of New York jurisdiction to appoint a receiver to liquidate the local assets of said A. K. M. within the State of New York pursuant to said statute and praying for judicial administration thereof and judgment and other relief in accordance with said statute. 92 93

IX: That thereafter and on or about the 12th day of June, 1941, upon proper application therefor, an order was duly made in said action, hereinabove in paragraph "VIII" described, appointing the defendant Henry M. Propper a Temporary Receiver of all assets of said A. K. M. in the

State of New York, with all rights and powers provided
94 for by said statute, a copy of which order is hereto annexed and made part hereof and marked "Exhibit B".

X: That on or about the 9th day of July, 1941 and prior to the commencement of this action, there was duly served upon the said ASCAP a certified copy of said order appointing defendant Temporary Receiver, as aforesaid, and a certificate of the Clerk of the County of New York certifying the qualification of this defendant as Temporary Receiver, together with a written demand, a copy of which is hereto annexed and made part hereof and marked "Ex-
95 hibit C", requiring said ASCAP, among other things, forthwith to pay to this defendant as such Temporary Receiver any and all moneys due and payable from said ASCAP to the said A. K. M. under said agreement; but the said demand has not been complied with in whole or in part and no part of said sum has been paid.

XI: That pursuant to and by virtue of the statute of the State of New York under which the defendant was appointed Temporary Receiver, as aforesaid, title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which said
96 A. K. M. then owned, was entitled to or might be entitled to claim or receive within the State of New York, vested in this defendant as such Temporary Receiver immediately upon the making of the order appointing him such Temporary Receiver.

XII: That thereafter such proceedings were had in said Supreme Court of the State of New York in said Sobotka action, hereinabove in paragraph "VIII" described, after

due and proper service of the summons in said action upon the defendant AKM in accordance with the provisions of said statute (Section 977-b) and otherwise in compliance therewith that on or about the 29th day of September, 1941 a final judgment was duly entered in said action pursuant to Subdivision 10 of said Section 977-b continuing defendant Henry M. Propper as Permanent Receiver to liquidate the assets, credits, choses in action, and property, tangible and intangible, in the State of New York of said A. K. M. in the manner provided for in said statute (Section 977-b), a copy of which final judgment is hereto annexed and made part hereof and marked "Exhibit D". 97 98

XIII: That all proceedings in said Sobotka action from the commencement thereof to the entry of said final judgment were regular and in accordance with the forms and statutes of the State of New York and the rules and practice of the Supreme Court of the State of New York in said County; and that the said order appointing this defendant Temporary Receiver and said final judgment continuing this defendant as Permanent Receiver, made and entered in said action as aforesaid, continued ever since and still are in full force and effect.

XIV: That subsequent to the order appointing defendant Henry M. Propper Temporary Receiver, and prior to said final judgment making him a Permanent Receiver, as aforesaid, and on or about the 29th day of July, 1941, pursuant to leave granted to defendant Henry M. Propper, as Temporary Receiver, by order made and entered in said Supreme Court of the State of New York, County of New York, on the 23rd day of July, 1941 in said Sobotka action, 99

100 an action was commenced by this defendant in the Supreme Court of the State of New York, County of New York, against the defendant ASCAP to recover from the defendant ASCAP the amount of the indebtedness due from it to the defendant A. K. M.; that said action is still pending and undetermined and is on the Reserve Calendar of said Supreme Court awaiting trial.

XV: That by reason of the premises A. K. M. had been divested of all right, title and interest in and to any and all property and assets within the State of New York, including the indebtedness referred to in Count 2 of the com-
101 plaint herein prior to the vesting order referred to in paragraph "9" of said Count 2, and that all right, title and interest in said property and assets including said indebtedness due from defendant ASCAP was at all of said times and still is in the defendant Henry M. Propper as Receiver, as aforesaid, and under the jurisdiction, possession and administration of the Supreme Court of the State of New York, for disposition in accordance with the provisions of said statute (Section 977-b).

Said Defendant, Further Answering Count 2 of Said Com-
plaint Herein, and as and for a Fourth, Separate and
102 *Distinct Defense Thereto, Alleges:*

XVI: The said defendant Henry M. Propper reiterates, repeats and realleges each and every allegation contained in paragraphs marked and designated "VI", "VII", "VIII", "IX", "X", "XI", "XII", "XIII" and "XIV" of this answer with the same force and effect as if the same were set forth herein.

XVII: That thereafter pursuant to the provisions of said final judgment and in compliance with subd. 11 of said statute (Section 977-b), proper notice was duly given and published requiring all creditors of A. K. M. to present and file claims with the defendant Henry M. Propper, as Receiver as aforesaid, and that pursuant to said notice a number of claims have been filed with the defendant Henry M. Propper as Receiver, aggregating approximately One Hundred Thousand ($100,000.00) Dollars, by a number of persons claiming to be creditors of said A. K. M.; that all of said claims were filed and all rights thereunder under said statute were acquired long prior to the vesting order alleged in paragraph "9" of said Count 2 of the complaint herein. 103 104

XVIII: Upon information and belief that all the persons who thus presented and filed claims with this defendant as Receiver were at all of said times and still are residents of the State of New York, or elsewhere in the United States; that some of them were and still are citizens of the United States and none of them was or is an alien enemy.

XIX: That none of said persons who so presented and filed claims with this defendant Henry M. Propper as Receiver, as aforesaid, is a party to this action, but all of them have by the filing of their respective claims, as aforesaid, made themselves and are now parties to said Sobotka action. 105

Said Defendant, Further Answering Said Count 2 of the Complaint Herein, and as and for a Fifth, Separate and Distinct Defense Thereto, Alleges:

XX: The said defendant Henry M. Propper reiterates, repeats and realleges each and every allegation contained

in paragraphs marked and designated "VI", "VII", "VIII",
106 "IX", "X", "XI", "XII", "XIII" and "XIV" of this answer with the same force and effect as if the same were set forth herein.

XXI: That prior to the commencement of the action by this defendant Henry M. Propper as Temporary Receiver and against the defendant ASCAP, as aforesaid, and on or about the 7th day of July, 1941 an order was duly made in said Sobotka action authorizing this defendant Henry M. Propper, as Temporary Receiver, as aforesaid, to retain and employ A. Walter Socolow and Hendricks,
107 Robbins & Buttenwieser, as attorneys to advise him as such Receiver and to render legal services in connection with said receivership, as more particularly set forth in said order, a copy of which order is hereto annexed and made part hereof and marked "Exhibit E".

XXII: That at the time of the commencement of said action by this defendant Henry M. Propper, as Temporary Receiver against the defendant ASCAP, as aforesaid, and for a considerable time prior and subsequent thereto, there was and still continues to be in full force and effect within the State of New York, a general statute known as Section
108 475 of the Judiciary Law of the State of New York relative to attorney's liens, as follows:

> "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which

attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34 eff. Sept. 1, 1938." 109

XXIII: That prior to the commencement of said action by this defendant Henry M. Propper as Temporary Receiver, as aforesaid, against the defendant ASCAP, said A. Walter Socolow and Hendricks, Robbins & Buttenwieser were duly employed and retained by this defendant as attorneys for such Receiver and since July 31, 1941 to date have rendered considerable professional services in connection with said action and otherwise, in accordance with the said order "Exhibit E" hereof. 110

XXIV: That by reason of the premises the said A. Walter Socolow and Hendricks, Robbins & Buttenwieser have acquired a lien upon the indebtedness alleged in said Count 2 of the complaint herein in accordance with said statute, in addition to their retaining lien on all papers in their possession, and otherwise, from the commencement of said action by this defendant against defendant ASCAP, and long prior to the vesting order alleged in paragraph "9" of said Count 2 of the complaint herein. 111

XXV. That neither said A. Walter Socolow nor Hen-
112 dricks, Robbins & Buttenwieser is a party to this action, but both of them are subject to the jurisdiction of the Supreme Court of the State of New York in said Sobotka action.

WHEREFORE, this defendant demands judgment dismissing said Count 2 of the complaint herein, together with the costs and disbursements of this action.

A. Walter Socolow
Attorney for Defendant Henry M.
113 *Propper, as Receiver, etc.,*
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

114

EXHIBIT A ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, etc.

Sec. 977-b. *Receivers to liquidate local assets of foreign corporations.* 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise. 115 116

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided. 117

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified com-

plaint alleging that the defendant is a foreign corporation
118 and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take,
119 receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court.

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint containing the allegations set forth in subdivision four hereof, and upon an affidavit
120 reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation or against whom a claim or demand in favor of such foreign

corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver. 121

6. The order directing service of the summons shall require the publication thereof in two newspapers published in the state of New York in the English language at least once a week for six successive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its domicile.

122

7. In an action pursuant to this section the summons must be served personally or an order directing service thereof by publication must be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service must be made complete by the continuance thereof.

8. If served by publication, service of the summons shall be deemed complete ten days after the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made. 123

9. In the event an answer is interposed on behalf of the defendant, any party to the action may at any time apply for and shall be entitled to an order setting the case down for trial on a day certain as a preferred cause.

124 10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for.

125 11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the state of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be less
126 than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

12. Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

13. After the expiration of the time limited by the judgment for the filing of claims with the receiver, the receiver shall prepare and submit to the court a detailed account showing the assets received, the disposition thereof and the value of any claims or assets which have not theretofore been reduced to cash, with a full description of each, and a statement showing the name and address of his attorney, if any, and the amount and the nature of the claim, and a statement of the allowance or disallowance thereof, and a statement of the costs and expense of the action and of the receivership. 127

14. Notice of the filing of such account shall thereupon be given to all persons or their attorneys who have appeared in the action or filed claims with the receiver, by mail to the address set forth in the proof of claim or notice of appearance together with notice that on a date specified therein not less than thirty days thereafter, an application will be made to the court for settlement of the receiver's account and for partial distribution in the event all the assets are not reduced to cash and for full distribution in the event the assets have theretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances. 128 129

15. Upon the return date of such application, or at such other time fixed by the court, the parties and claimants may be heard and proof taken and the receiver's account settled by the court or by a referee appointed for that purpose by the court.

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in the discretion of the court, to the receiver or liquidator, if

any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto. 133

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or 134
organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country.

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any kind and every kind 135
whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspen-

sion, revocation or annulment of its charter or organic
136 law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts
137 of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution,
138 nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Noth-

ing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile. 139

20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor. 140

21. If any receiver or trustee has heretofore been appointed in this state for such corporation or its property in any action or proceeding, either before or supplementary to judgment, otherwise than in an action brought pursuant to this section, such receiver or trustee may be appointed or continued as the receiver in any action brought pursuant to the provisions of this section.

22. The appointment of a receiver pursuant to this section or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation. 141

23. An action must be commenced under this section within three years from the effective date of this act or within three years from the discovery by the plaintiff or his

predecessor in interest, of any asset of said corporation in
142 the state of New York, whichever date is the later.

24. The terms "property" and "assets" as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state.

25. If any of the provisions of this act or the application thereof to any person or circumstances be held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the in-
143 valid provision or application, and to this end the provisions of this act are declared separable.

144

EXHIBIT B ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.

145 At a Special Term Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, in the Borough of Manhattan, City of New York, on the 12th day of June, 1941.

Present:

HON. SAMUEL I. ROSENMAN,

Justice

146 FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Defendant.

Upon reading and filing the summons herein dated the 9th day of June, 1941, the complaint verified the 9th day of June, 1941, and the affidavits of Franz Sobotka and A. 147 Walter Socolow, both sworn to the 9th day of June, 1941 and it appearing to the satisfaction of the Court that personal service of the summons herein cannot be effected within the State of New York with due diligence and that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible, within the State of New York and that the defendant has been liquidated and that it has ceased doing business

Now, on motion of A. Walter Socolow, attorney for the
148 plaintiff, for the appointment of a Temporary Receiver of the property within the State of New York of the defendant and after hearing A. Walter Socolow, attorney for the plaintiff in support of said motion, it is

ORDERED, that HENRY M. PROPPER of No. 42 East 41st Street, New York, be and he hereby is appointed Temporary Receiver pending the determination of this action, and that the said Receiver be and he is hereby directed to take, receive and reduce to his possession any and all assets, property, credits and choses in action and property,
149 tangible and intangible, within the State of New York, of the defendant, and hold the same until the further order of this Court; and it is further

ORDERED, that the said Temporary Receiver shall have all the powers and duties in addition to those herein provided for, as are possessed by and conferred upon Receivers and Trustees by the laws of the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED that the said Temporary Receiver shall before entering upon the
150 duties of his trust, execute to the People of the State of New York, and file in the office of the Clerk of the County of New York his bond with sureties to be approved by a Justice of this Court in the penal sum of $1,000.00 Dollars, conditioned for the faithful performance of his duties as such Receiver; should the property coming into the hands of the Receiver exceed this amount, Receiver is to apply to this Court for an order increasing the amount of his bond.

ORDERED, ADJUDGED AND DECREED that the said Temporary Receiver may at any time, upon proper notice to all parties who have appeared in this action, apply to this Court for further and other instructions and powers necessary to enable the said Temporary Receiver to fulfill his duties; and it is further 151

ORDERED, ADJUDGED AND DECREED that the said Temporary Receiver shall forthwith deposit all monies received by him in his own name as Temporary Receiver in the National City Bank, New York and no withdrawals shall be permitted therefrom, except as directed by this Court. 152

Enter

S. I. R.
J. S. C.

153

EXHIBIT C ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.

154

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW-YORK

FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

155

Defendant.

SIRS:

PLEASE TAKE NOTICE, that by an order of the Supreme Court of the State of New York, in and for the County of New York, made in the above entitled action on the 12th day of June, 1941 and entered in the office of the Clerk of the County of New York on the 13th day of June, 1941, now on file in the office of the Clerk of the County of New York, a certified copy of which is herewith served upon you, the undersigned was duly appointed Temporary Receiver of the property and assets of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M. (hereinafter referred to as the defendant corporation) within the State of New York and that the undersigned has duly qualified and now is acting as such Temporary Receiver as shown from the Certificate of qualification herewith also served upon you.

156

PLEASE TAKE FURTHER NOTICE, that pursuant to said order, demand is hereby made upon you that you forthwith pay to the undersigned as such Temporary Receiver any and all claims or demands now existing in favor of said defendant corporation and against the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP) and particularly:

1. Certain claims and demands for moneys collected by and due from said ASCAP to the defendant corporation as license fees, royalties and other income from various licenses on account of the performance in the United States and its territories and possessions of the musical works and compositions of members and/or shareholders of the defendant corporation pursuant to an agreement between the defendant and the said ASCAP, dated the 1st day of January, 1933, as originally entered into, and as extended or renewed from time to time thereafter, and any and all other agreements between said ASCAP and the defendant corporation.

PLEASE TAKE FURTHER NOTICE, that pursuant to said order, further demand is hereby made upon you that you forthwith turn over and deliver to the undersigned, as such Temporary Receiver, any and all property and assets belonging to said defendant corporation now in your possession or control and particularly:

1. The listings and catalogue of musical works and compositions of authors, composers and publishers who have been or are members and/or shareholders of the defendant corporation.

2. The performing rights within the United States
160 of America and its territories and possessions in and to any and all musical works and compositions of authors, composers and publishers who have been or are members and/or shareholders of the defendant corporation as shown in the listings and catalogue referred to in Item 1 hereof; and

3. Any and all other property and assets of whatsoever kind, nature or description, including (but not limited to) any and all books, records, papers and documents of whatsoever kind, nature and description,
161 belonging to the said defendant corporation.

PLEASE TAKE FURTHER NOTICE, that pursuant to said order, further demand is hereby made upon you that you forthwith render to the undersigned, as such Temporary Receiver, a just and true accounting of any and all transactions, dealings, acts, matters or things of whatsoever kind or nature arising out of or relating to the agreement between the said ASCAP and the defendant corporation, dated the 1st day of January, 1933, as originally entered into, and as thereafter renewed or extended, and any and all other agreements between said ASCAP and the
162 said defendant corporation and that upon such accounting you forthwith pay to the undersigned as such Temporary Receiver any and all moneys found due from you to the defendant corporation in addition to the moneys, property and assets hereinbefore referred to.

Exhibit C Annexed to Answer of Henry M. Propper, etc.

Dated, New York, July 7th, 1941.

Yours, etc.,

HENRY M. PROPPER
Temporary Receiver

A. WALTER SOCOLOW,
Attorney for Temporary Receiver,
Office & P. O. Address,
608 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
30 Rockefeller Plaza,
Borough of Manhattan,
City of New York.

EXHIBIT D ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.,

166 At a Special Term Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse therein, in the Borough of Manhattan, City of New York, on the 29th day of September, 1941.

Present:

HON. PETER SCHMUCK

Justice

167

FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Defendant.

168 It appearing by the affidavits of FRANK J. CUMMISKEY and UPTON E. LIPTROTT, both sworn to the 27th day of August, 1941, and the affidavit of A. WALTER SOCOLOW, sworn to the 27th day of September, 1941, that the summons in the above entitled action was served on the defendant by publication and that more than twenty (20) days have elapsed since said service was completed and that the defendant has not appeared, answered or served a notice of motion addressed to the sufficiency of the complaint in the said action and that the said defendant

Exhibit D Annexed to Answer of Henry M. Propper, etc.

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M., is now in default, 169

NOW, on motion of A. WALTER SOCOLOW, attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED that HENRY M. PROPPER, of No. 12 East 41st Street, Borough of Manhattan, City of New York, the Temporary Receiver herein appointed by order of this Court, dated the 12th day of June, 1941, be, and he hereby is, appointed Permanent Receiver for the defendant; and it is further 170

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver be, and he hereby is, directed to receive and reduce to his possession any and all assets, credits, choses in action and other property, tangible and intangible, belonging to the defendant which the defendant may have, or be entitled to, or may be entitled to claim or receive in the State of New York, and to liquidate the same in the manner herein provided for, to wit: 171

1. That the said Permanent Receiver be, and he hereby is, directed to reduce to cash, as speedily as possible, any and all assets, credits, choses in action and other property,

tangible and intangible, of the said defendant which it may
172 have, or be entitled to, or may be entitled to claim or to receive in the State of New York and to give notice to all creditors and other persons interested in the said defendant by publishing once a week for three weeks in New York Law Journal and Journal of Commerce a notice, requiring such creditors and interested persons to present to said Receiver proof of their claims against or interests in the said defendant within sixty-five (65) days after the last date of publication.

2. That the said Permanent Receiver after the expira-
173 tion of the time limited by the published notice for the filing of the claims with him shall prepare and submit to the Court a detailed account showing the assets received, the dispositions thereof and the value of any claims or assets which may have not heretofore been reduced to cash with the full description of each and a statement showing the names and addresses of each and every claimant, and the name and address of his attorney, if any, and the amount and nature of the claim; and a statement of the allowance and disallowances thereof, and a statement of the costs and expenses of the action and of the Receivership.

174 3. That the said Permanent Receiver shall, after the filing of such account, give notice to all persons and their attorneys who have appeared in the action or filed claims with the Receiver by mail, to the addresses set forth in the proof of claim, or notices of appearance together with notice that on the date specified therein, no later than thirty (30) days thereafter, an application will be made to the Court for settlement of the Receiver's account and

for partial distribution in the event that all the assets are not reduced to cash, and for full distribution in the event that the assets have heretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances; and it is further 175

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver, before entering upon the duties of his trust execute to the People of the State of New York and file in the Office of the Clerk of the County of New York his bond with sureties to be approved by a Justice of this Court in the penal sum of $1,000,00 conditioned for the faithful performance of his duties as such Receiver; and that should the property and assets coming into the hands of said Receiver exceed this amount, said Receiver is to apply to the Court for an order increasing the amount of his bond; and it is further 176

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver may at any time upon proper notice to all parties who have appeared in this action, apply to this Court for further and other instructions and powers necessary to enable the said Receiver to fulfill his duties; and it is further 177

ORDERED, ADJUDGED AND DECREED, that the said Receiver shall forthwith deposit all monies received by him in his own name as Permanent Receiver in the National City Bank and no withdrawals shall be permitted therefrom except as directed by this Court, and it is further

178 ORDERED, ADJUDGED AND DECREED, that the plaintiff herein may tax costs pursuant to statute and that the attorney for the plaintiff herein may apply for an allowance for services rendered herein and disbursements expended.

Enter

P. S.
J. S. C.

179

180

EXHIBIT E ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.

At a Special Term, Part I of the Supreme Court of the State of New York held in and for the County of New York at the County Court house therein, in the Borough of Manhattan, City of New York, on the 7th day of July, 1941. 181

Present:

HON. SAMUEL I. ROSENMAN,

Justice.

FRANZ SOBOTKA, 182

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.

Defendant.

The plaintiff above named having moved by order to show cause dated the 18th day of June, 1941 for an order revoking the appointment of Henry M. Propper as Temporary Receiver herein and appointing some other suitable person as Temporary Receiver in his place and stead, or in the alternative, directing that the above entitled action be discontinued without prejudice and that the order made herein on the 12th day of June, 1941 appointing a Temporary Receiver of the assets and property of the defendant within the State of New York be vacated and set aside without prejudice to any rights of the plaintiff and said 183

184 motion having duly come on regularly to be heard at Special Term Part I of this Court

AND on reading and filing the order to show cause dated the 18th day of June, 1941, and the affidavit of Franz Sobotka sworn to the 18th day of June, 1941 with proof of due service thereof and the reply affidavits of A. Walter Socolow and Aristides G. Lazarus, sworn to the 23rd day of June, 1941 and the 20th day of June, 1941 respectively and upon the filed papers herein all submitted in support of said motion and the affidavit of Henry M. Propper, sworn to the 19th day of June, 1941 and the further affi-
185 davit of Henry M. Propper, sworn to the 24th day of June, 1941 in opposition thereto and after hearing A. Walter Socolow, Esq. attorney for the plaintiff in favor of said motion and Hendricks, Robbins and Buttenweiser, Esqs. (Ira S. Robbins, Esq. of Counsel) attorneys for the Temporary Receiver herein in opposition thereto and it appearing to the satisfaction of the Court that special circumstances exist herein and that this is a particular case requiring the employment by the Temporary Receiver of additional counsel as provided for by Rule 180 of the Rules of Civil Practice and upon reading and filing the stipulation dated the 3rd day of July, 1941 and the affidavit of Franz
186 Sobotka, sworn to the 3rd day of July, 1941 and upon the consent to the entry of this order appearing at the foot hereof and due deliberation having been had and upon filing the opinion of the Court, it is

ORDERED, that the said motion be, and the same hereby is, disposed of as follows:

1. That Henry M. Propper, the Temporary Receiver herein be and he hereby is authorized to retain and

employ A. Walter Socolow, Esq. of No. 608 Fifth Avenue, Borough of Manhattan, City of New York, as his attorney to advise, appear for and represent him as such Temporary Receiver, in any and all steps, actions or proceedings against any third parties for the recovery or collection of any and all property and assets of the defendant corporation and for the reduction of any and all such property and assets into his possession as such Receiver. 187

2. That Henry M. Propper, the Temporary Receiver herein, be and he hereby is authorized to employ and retain Hendricks, Robbins and Butterweiser, Esqs. of No. 7 Dey Street, Borough of Manhattan, City of New York, as his attorneys to advise, appear for and represent him as such Temporary Receiver in any and all other matters and to advise him in connection with any papers in any of the steps, actions or proceedings referred to in Paragraph "1" hereof which may require his signature. 188

and it is further

ORDERED that the entry of this order upon the papers hereinabove recited be and the same hereby is deemed in full compliance with the provisions of Rule 180 of the Rules of Civil Practice and that upon the entry of this order the said Henry M. Propper, as such Temporary Receiver, be and he hereby is authorized to employ attorneys as hereinabove provided. 189

ENTER

S. I. R.
J. S. C.

Exhibit E Annexed to Answer of Henry M. Propper, etc.

Entry of the above order is hereby consented to.

190

Dated: New York, N. Y. July 3rd, 1941.

A. WALTER SOCOLOW
Attorney for Plaintiff

HENRY M. PROPPER
Temporary Receiver

HENDRICKS ROBBINS & BUTTENWEISER
Attorneys for Temporary Receiver

191

192

Answer of Defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers

193

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. Civ. 35-581

[SAME TITLE]

The defendant, DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP), an unincorporated association of more than seven members, answering the complaint herein, by Schwartz & Frohlich, his attorneys: 194

COUNT 1.

1. Admits that on or about June 19, 1933, ASCAP and SACEM entered into an agreement in writing, of which a copy is set forth as Exhibit "A", annexed to the complaint, and denies each and every other allegation contained in paragraph 4, as said agreement Exhibit "A" speaks for itself. 195

2. Denies that at all times SACEM has duly performed its obligations under the terms of said agreement, Exhibit "A", annexed to the complaint, but admits that the said agreement became effective on or about January 1, 1933, and has remained in full force and effect, all as alleged in paragraph 5 of the complaint.

196 3. Admits that commencing January 1, 1933 and at all times thereafter, ASCAP has licensed the performance of musical works vested in or controlled by SACEM, and has received and collected license fees for such performances, and denies each and every other allegation contained in paragraph 6.

4. Admits that on September 11, 1943, plaintiff made written demand on ASCAP for delivery of license fees collected and withheld by it, and admits that in response to said demand ASCAP has delivered to plaintiff certain
197 moneys, but denies each and every other allegation contained in paragraph 8 of the complaint.

COUNT 2.

5. Admits that defendant, Henry M. Propper, claims to be a duly appointed Receiver of the property and assets of AKM, and claims to have title to the monies which are the subject of this Count 2, and denies each and every other allegation of paragraph 3.

6. Admits that on or about January 1, 1933, ASCAP
198 and AKM entered into an agreement in writing, a copy of which is set forth as Exhibit "B", annexed to the complaint, but denies each and every other allegation contained in paragraph 5, as said agreement, Exhibit "B", speaks for itself.

7. Admits that said agreement became effective January 1, 1933, and denies each and every other allegation contained in paragraph 6.

Answer of Defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers

8. Admits that between January 1, 1933 and December 31, 1938, ASCAP licensed in the United States and its territories the performance of its musical works vested in or controlled by AKM, and received and collected license fees therefor, and denies each and every other allegation contained in paragraph 7. 199

9. Admits that on September 11, 1943, plaintiff made written demand on ASCAP for delivery of moneys collected by it, and denies each and every other allegation contained in paragraph 10.

200

COUNT 3.

10. Admits that on or about January 1, 1933 ASCAP entered into an agreement with GEMA and with GDT, a copy of which is annexed to the complaint as Exhibit "C", and denies each and every other allegation contained in paragraph 4, as said agreement, Exhibit "C", speaks for itself.

11. Admits that said agreement, Exhibit "C", by its terms became effective January 1, 1933, and that GEMA and GDT were replaced by STAGMA, and denies each and every other allegation contained in paragraph 5. 201

12. Admits that commencing January 1, 1933, ASCAP has licensed in the United States and its territories and possessions performance in musical works vested in and controlled by GEMA and GDT and their successor in interest, STAGMA, and has received and collected license fees for such performance, and denies each and every other allegation contained in paragraph 6.

Answer of Defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers

202 13. Admits that on September 11th, 1943, plaintiff made written demand on ASCAP for delivery of license fees, and that ASCAP has delivered to plaintiff certain monies, and denies each and every other allegation contained in paragraph 8 of said complaint.

As and for a Separate and Distinct Defense:

14. All three contracts, Exhibits "A", "B" and "C", annexed to the complaint, were treated by the parties as giving each the right to set off against the other excess monies
203 due after balancing accounts, and all funds allocable by each of the parties to the other were treated as current accounts, and from time to time the parties thereto by their own interpretation and construction of said contracts, treated all such funds as current accounts and rendered statements and made payments to each other in that manner.

15. That all of the parties to the contracts with ASCAP, Exhibits "A", "B" and "C", to wit: SACEM, AKM, GEMA, GDT and STAGMA, have failed to remit license fees collected by them in their respective countries to ASCAP, and that each of said foreign societies is presently indebted
204 for large sums of money to ASCAP, and there is a balance in favor of ASCAP as against each of said foreign societies in excess of many thousands of dollars, the exact amount of which is presently unknown to this defendant.

16. By reason of the premises, ASCAP, far from owing any moneys to any or all of said foreign societies, is entitled to receive and collect from each of said foreign societies presently many thousands of dollars, the exact

amount of which is presently unknown to this defendant, and there is not due and owing at the present time any monies from ASCAP to any of the said foreign societies or to the plaintiff by virtue of his writ of seizure. 205

WHEREFORE, defendant demands judgment dismissing the bill of complaint, with costs.

SCHWARTZ & FROHLICH
Attorneys for Defendant,
Deems Taylor, etc.

By LOUIS D. FROHLICH
Member of Firm 206

207

DISTRICT COURT OF THE UNITED STATES

208 FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein and the answer of the defendant Henry M. Propper,
209 as Receiver, as aforesaid, now on file in the office of the Clerk of this Court, and upon the annexed affidavit of Henry M. Propper, sworn to the 28th day of May, 1946, the affidavit of Morris W. Primoff, sworn to the 27th day of May, 1946, and the affidavit of A. Walter Socolow, sworn to the 28th day of May, 1946, and the exhibits referred to and annexed to said answer and affidavits, and upon all the other papers and proceedings heretofore had herein, the undersigned will move this Court at a Stated Term thereof, to be held at Room 1306 of the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 11th day of June, 1946, at 10:30
210 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order

(1) pursuant to Subd. (c) of Rule 12 of the Rules of Civil Procedure, granting judgment on the pleadings herein dismissing the second count in the complaint herein, with costs to said defendant, on the ground that it appears upon the face of said count that the

same does not state a claim upon which relief can be granted, 211

or, in the alternative,

(2) pursuant to Rule 56 of the Rules of Civil Procedure, granting summary judgment dismissing the second count of the complaint herein, with costs to said defendant, on the ground that the pleadings herein and the said affidavits annexed hereto show that there is no genuine issue as to any material fact and that on the undisputed facts of record said second count makes out no claim upon which relief can be granted. 212

And for such other and further relief in the premises as to the Court may seem just and proper.

Dated, N. Y., May 28, 1946.

Yours, &c.,

A. Walter Socolow,
Attorney for Defendant
Henry M. Propper, etc.,
580 Fifth Avenue,
Borough of Manhattan, 213
City of New York.

To:

John F. X. McGohey, Esq.,
United States Attorney,
Attorney for Plaintiff.

Deems Taylor, as President of the
American Society of Composers,
Authors and Publishers, etc.

Affidavit of Henry M. Propper

DISTRICT COURT OF THE UNITED STATES

214 FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HENRY M. PROPPER, being duly sworn, deposes and
215 says:

I am one of the defendants in the above entitled action, being sued herein as a Receiver of the foreign corporation A. K. M., referred to in Count 2 of the complaint herein, and as such Receiver I have both title and possession of the subject of the action involved in said Count 2 of the complaint,—such title and possession having been vested in me as early as June 12, 1941 under the circumstances hereinafter referred to by the express provisions of Section 977-b of the New York Civil Practice Act, under which I was appointed Receiver.

216 This action is brought by plaintiff Alien Property Custodian to recover from defendant ASCAP certain sums of money owing from it to certain European performing rights societies, including AKM, claimed by this plaintiff to have been seized by him under his power and authority and in his capacity as Alien Property Custodian. I am joined as defendant in the action only with respect to Count 2 of the complaint, which relates to the indebtedness originally owed by ASCAP to AKM and the relief sought against

me is a judgment that I have acquired no title or right to the indebtedness in question. 217

As already stated, I was appointed Receiver in the action hereinafter stated, under Section 977-b of the New York Civil Practice Act.

Subdivision 19 of Section 977-b of the Civil Practice Act, under which I was appointed Receiver herein, provides, in part, as follows:

> "Title to all assets, credits, choses in action and property, tangible and intangible, of any kind and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him." 218

Subdivision 20 of the same section also provides:

> "Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor." 219

Subdivision 16 of the same section, as amended by Laws of 1938, Chapter 604, in effect April 9, 1938, further provides:

"Upon settlement of the receiver's account, the court
220 must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state
221 prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes
222 of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with

their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto." 223

Subdivision 24 of the said section provides:

"The terms 'property' and 'assets' as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state."

224

It thus appears that under Subdivision 19 of said Section title to the assets and property, including choses in action, of the foreign corporation proceeded against thereunder vested in the Receiver from the date of his appointment. By Subdivision 20 possession of such assets and property, including choses in action, is deemed to be in the Receiver from the date of the service of the order of his appointment, together with a demand, and the beneficial interest is vested in the persons mentioned according to the priorities specified in Subdivision 16 which provides no interest whatsoever, legal or equitable, as remaining in the foreign corporation after the appointment of such Receiver. 225

I was appointed first a temporary receiver by order of Court and then was continued as permanent receiver by a final judgment of Court. Said order and final judgment were entered in an action brought in the Supreme Court of the State of New York, County of New York by one Franz Sobotka, as plaintiff, against AKM, as defendant, for the appointment of a Receiver to liquidate the local assets of said AKM, pursuant to and under said Section 977-b

of the Civil Practice Act. The judgment roll and all the
226 papers in said Sobotka action are now on file in the office of the clerk of the said Supreme Court of the State of New York, County of New York under file No. 12719/1941.

It appears from said judgment roll and papers in the Sobotka action that on June 12, 1941, an order was made in said Sobotka action by Mr. Justice Rosenman appointing me a Temporary Receiver with power and authority to take, receive and reduce to my possession any and all assets, credits, choses in action and property, tangible and intangible, in the State of New York of said AKM, and to hold the same until the further order of the said Su-
227 preme Court of the State of New York, and with all the powers and duties, in addition to those therein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the State of New York, as provided for in subds. 4 and 12 of said Section 977-b. I respectfully refer to said order, a copy of which is annexed to my answer herein as "Exhibit B", with the same force and effect as if annexed to this affidavit.

Thereafter, on July 9, 1941, pursuant to Subdivision 20 of said Section 977-b, there was duly served upon the defendant ASCAP a certified copy of said order appointing
228 me Temporary Receiver and a certificate of my qualifications as such Temporary Receiver, together with a written demand, requiring defendant ASCAP, to, among other things, forthwith pay to me as such Temporary Receiver any and all moneys due and payable from said ASCAP to AKM under the agreement which is the subject of this action. I respectfully refer to the said demand, a copy of which is annexed to my answer herein as "Exhibit E", with the same force and effect as if annexed to this affidavit.

Said demand not having been complied with, an order was made in the Sobotka action on July 23, 1941 authorizing me to bring an action against ASCAP, and such action was thereupon commenced on July 29, 1941, as hereinafter set forth. 229

Thereafter, on September 29, 1941, a final judgment was entered in said Sobotka action, pursuant to Subdivisions 10 and 11 of said Section 977-b, continuing me as Permanent Receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the State of New York of said AKM in the manner provided for in said Subdivision 11 of said Section 977-b.

I respectfully refer to said judgment, a copy of which is annexed to my answer herein as "Exhibit D", with the same force and effect as if the same were annexed to this affidavit. 230

Upon the entry of said final judgment, due notice to all creditors and other persons interested in said AKM was published. In accordance with the above quoted provisions in said final judgment, and pursuant to said notice, a number of claims were presented and filed with me aggregating in the neighborhood of one hundred thousand dollars.

All persons who thus presented and filed claims are residents of the State of New York and elsewhere in the United States. Some of them are citizens of the United States and none of them is an alien enemy. 231

The following is a partial list of the persons who thus filed claims with me, together with their addresses, amounts of the claim, etc.:

Name of Claimant	*Address*	*Amount of Claim*
Morris W. Primoff	1192 Park Avenue, New York City.	$ 762.98
Franz Sobotka	166 West 72nd Street, New York City.	22,737.18
Hermann Leopoldi	255 West 90th Street, New York City.	6,888.02
Luise Ascher	617 West 113th Street, New York City.	10,384.02
Ladislas Szucs	Beverly Hills, Cal.	48,302.92
Charles Hein	Los Angeles, Cal.	1,350.00

None of said claimants is a party to this action.

Prior to the said final judgment and after my appointment as Temporary Receiver, to wit, on July 29, 1941, pursuant to leave granted me by order made by, and entered in, the Supreme Court of the State of New York, County of New York on the 23rd day of July, 1941, granting me leave to commence an action against defendant ASCAP, I did commence such action against defendant ASCAP, suing therein as Receiver, for the recovery of the indebtedness theretofore owing from defendant ASCAP to the defendant AKM. Said action is still pending in the Supreme Court of the State of New York, County of New York, and is now on the Reserve Calendar awaiting trial. The complaint in said action alleges, and the amended answer of the defendant ASCAP therein admits, my appointment as Receiver by order of the said Supreme Court dated June 12, 1941, and my authorization to institute said action by order of the said Supreme Court dated July 23, 1941, both orders having been entered more than two years prior

to the issuance of the alleged order of the Alien Property Custodian. Paragraph "Fifteenth" of the complaint further alleges, and paragraph "9" of defendant ASCAP's amended answer further admits, 235

> "that on or about the 9th day of July, 1941, and prior to the commencement of this action there was served upon defendant a certified copy of an order purporting to appoint plaintiff Temporary Receiver of A. K. M., together with a written demand that defendant, among other things, pay to plaintiff any and all moneys due to the said A. K. M., and that defendant has made no payments to plaintiff." 236

It is clear that all of the foregoing, including my appointment as Receiver, the commencement of the action and the joinder of issue, were *ante bellum* acts and proceedings which took place long before the United States was forced into World War II on December 7, 1941. It is clear that long prior to World WAR II AKM had been completely divested of all right, title and interest, legal and equitable, to the assets in question, including the subject of the action and the cause of action herein by the aforesaid *ante bellum* acts and proceedings in accordance with the above quoted provisions of said Section 977-b. 237

The final judgment in the Sobotka action cannot be nullified, as it is sought to do by the instant action. The only thing which remains to be done by me under the judgment in the Sobotka action is the requirement that I, as Permanent Receiver of the assets of AKM in this State, file my accounting in the said Supreme Court and distribute the assets in my hands in accordance with the provisions of Section 977-b and the further order of the Court, after

recovering the proceeds of the action against ASCAP.
238 Should it appear on said final accounting that there are any funds in my hands as Receiver, after payment of claims of all local creditors, which may be the property of AKM, then, and only in such an event, would the Alien Property Custodian be entitled to receive such funds under the alleged vesting order. No distribution will be made by me to AKM under any circumstances without consultation with the Alien Property Custodian. The rights of the Alien Property Custodian to any property which may eventually be left in my hands after payment of local creditors may be asserted by filing a claim with me as Receiver, as indi-
239 cated in *United States* v. *Bank of New York & Trust Company*, 296 U. S. 463, at 480-481 and *Meyer et al.* v. *Petrograd Metal Works, et al.*, 256 App. Div. 1077, App. Den. 281 N. Y. 887. It is significant that no claim has been filed with me by the Alien Property Custodian and no demand whatsoever has been made upon me by that office, other than the commencement of this action.

The Court will note that the vesting order, which is the basis of Count 2 of the complaint herein, was issued on September 4, 1943, more than two years after my appointment as Temporary Receiver, and two years after my
240 appointment as Permanent Receiver, and two and one-half years before the commencement of this action. In other words, for two and one-half years nothing was done by the Alien Property Custodian with respect to the subject of Count 2 of the complaint herein until the institution of this action on April 22, 1946.

Prior to the institution of this action, however, to wit, on March 8, 1946, by Section 20 of the Trading With the Enemy Act, as amended by Public Law 322, 79th Congress, approved March 8, 1946, and by Section 32 of said Act,

as added by the said Public Law 322, the President of the United States, or such officer or agency as he may desig- 241
nate, was authorized to restore seized property to persons who are citizens of enemy countries and who were not hostile to the United States. By Executive Order 9725, issued by the President on May 16, 1946, the powers of authority of the President under said Sections 20 and 32, as thus amended and added, were conferred upon the Alien Property Custodian. Under said sections and said Executive Order, all property of Austrian nationals should, therefore, be released and is not subject to any rights of the Alien Property Custodian. Consequently, even con- 242
ceding, without admitting, that the Alien Property Custodian's vesting order in the instant case had any legal effect with respect to my property as Receiver, the Custodian's rights thereto would be terminated under the present policy of the United States, as reflected by Congressional action and the recent Executive Order. *A fortiori*, my right, title and interest to the property in question, acquired by me as Receiver long prior to World War II, and the rights of local creditors acquired through the receivership proceedings, cannot be questioned by the Alien Property Custodian or anyone else.

During all the times mentioned in the complaint herein 243
and in this affidavit, I was and still am a citizen of the United States and a resident of the State of New York, and, as already stated, the persons who filed claims against, and acquired rights to, the property and assets in question are residents of the State of New York and other parts of the United States, some of whom are citizens of the United States, and none of them was ever a national of a country which was hostile to the United States.

244 WHEREFORE, I respectfully pray that an order be made herein directing judgment on the pleadings, or summary judgment dismissing Count 2 of the complaint herein, with costs, and granting such other and further relief as to the Court may seem just and proper.

HENRY M. PROPPER

(Sworn to May 28, 1946.)

245

246

Affidavit of Morris W. Primoff

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

247

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MORRIS W. PRIMOFF, being duly sworn, deposes and says: 248

At all the times hereinafter mentioned, I was, and still am, a citizen of the United States and of the State of New York, and was, and still am, an attorney at law duly admitted to practice as such in the Courts of the State of New York. I am also a Certified Public Accountant. At all of said times, I resided and still reside, and had, and still have, my office for the practice of my profession in the City and State of New York. My present residence is at 1492 Park Avenue, Manhattan, and my office address is 551 Fifth Avenue, Manhattan.

I am a creditor of the above named A. K. M., upon a 249
certain claim and demand based upon the facts and circumstances following:

On the 27th day of January, 1939, more than two years prior to the appointment of the above named defendant Henry M. Propper, as Receiver of A. K. M., and, of course, two years before World War II, in an action by me as plaintiff and against A. K. M. as defendant, then pending in the Municipal Court of the City of New York, Borough

of Manhattan, Ninth District, in the City and State of
250 New York, a judgment was rendered in my favor as such plaintiff and against said A. K. M. as defendant, in the sum of Nine Hundred Ninety-two and 98/100 ($992.98) Dollars. A transcript of said judgment is hereto annexed and made part hereof, marked Exhibit A.

Said judgment was recovered upon a complaint alleging a balance due and owing me from A. K. M. on account of professional services in the field of taxation rendered by me to A. K. M. at its special instance and request, and disbursements incurred in connection therewith between on or about the 1st day of October, 1937 and the 1st day of
251 April, 1938, nearly four years before the appointment of the above named defendant as Receiver and World War II. Said professional services were rendered, and said disbursements were incurred within the City of New York, and the cause of action on said judgment was one which accrued within the City and State of New York. No part of the judgment recovered in said action has been paid except the sum of Two Hundred and Thirty ($230.00) Dollars, leaving a balance due me from said A. K. M. in the sum of Seven Hundred Sixty-two and 98/100 ($762.98) Dollars with interest from the 27th day of January, 1939, which is still due and owing me.

252 Pursuant to the directions of the judgment rendered in the action in which Mr. Propper was appointed a Receiver, and the notice to present claims published pursuant to said judgment, I duly filed with the above named Mr. Propper, as such Receiver, a proof of claim in due and legal form for the balance due me on said judgment, and thereupon I became a party to the action in which Mr. Propper was ap-

pointed Receiver. Under the provisions of Subdivision 16 of Section 977-b of the Civil Practice Act, pursuant to which Mr. Propper was appointed Receiver, I am one of the persons who have a beneficial interest in the assets and property of which Mr. Propper was thus appointed Receiver. 253

Neither I nor any of the other persons who have filed claims with said Receiver are parties to this action. I respectfully maintain that this Court may not therefore make any determination in this action which may affect the Receiver's title to the assets and the beneficial interest acquired by me and the other persons who have filed claims with the Receiver. Such determination would deprive me and the other claimants against the Receiver of our property without due process of law, and would be contrary to the decision of the Supreme Court of the United States in United States v. Bank of New York & Trust Company, 296 U. S. 463, at 480-481. 254

MORRIS W. PRIMOFF

(Sworn to May 27, 1946.)

255

EXHIBIT A ANNEXED TO AFFIDAVIT OF MORRIS W. PRIMOFF

256 Index No. 2401 Year 1939.

MUNICIPAL COURT OF THE CITY OF NEW YORK
Borough of Man.
9th District

Time of Docketing	Names of Parties Against Whom Judgment has been Obtained	Names of Parties in Wh Favor Judgment has be obtained
1/27/39	Staatlich Genehmigte Gesellschaft, Der Autoren, Komponisten und Musikverleger (A. K. M.), a corporation 11 West 42	Morris W. Primoff 551—5th Ave.

257

Amount of Judgment	
Damages,	$ 956.98
Costs,	$ 33.00
Prospective Fees,	$ 3.00
Total,	$ 992.98

258

A. Walter Socolow,
Attorney for
Judgment Creditor

I CERTIFY that the foregoing is a correct transcript of the docke of the above judgment. I further certify that the words "Not Sum moned" are written opposite the names of the following defendants:

Dated Nov. 8, 1945

Estelle M. Corcoran (Sea Clerk.

EXHIBIT B ANNEXED TO AFFIDAVIT OF MORRIS W. PRIMOFF

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PROOF OF CLAIM

FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH, GENEHMIGTE GESELLSCHAFT, DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MORRIS W. PRIMOFF, being duly sworn, deposes and says:

1. That he is one of the claimants herein.

2. That he resides at No. 1192 Park Avenue, in the Borough of Manhattan, City and State of New York.

3. That he is a creditor of Staatlich Genehmigte Gesellschaft Der Autoren, Komponisten Und Musikverleger (hereinafter referred to as A. K. M.) upon a certain claim and demand based upon the facts and circumstances hereinafter set forth.

Exhibit B Annexed to Affidavit of Morris W. Primoff

4. That on or about the 27th day of January, 1939, in
262 the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, in the City and State of New York, in an action therein duly pending after due personal service of the summons within said City and State upon said A. K. M. wherein deponent was plaintiff and the said A. K. M. was defendant, judgment was duly given in favor of deponent and against A. K. M. in the sum of $989.98.

5. That no part of said judgment has been paid, except the sum of $230.00, leaving a balance due deponent from said A. K. M. in the sum of $759.98 with interest from the
263 27th day of January, 1939, which deponent now claims.

WHEREFORE, deponent respectfully prays that his claim against said A. K. M. be allowed in the sum of $759.98 with interest as aforesaid, and for such other and further relief as may be just and proper.

MORRIS W. PRIMOFF

Sworn to before me this
10th day of June, 1942.

264 RUTH STEIGMAN
Notary Public, New York County
N. Y. Co. Clk's No. 349 Reg. No. 38767
Commission Expires March 30, 1943

Affidavit of A. Walter Socolow

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

265

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes and says:

266

At all the times hereinafter mentioned, I was, and still am, a citizen of the United States and of the State of New York, and was, and still am, an attorney at law duly admitted to practice as such in the courts of the State of New York, in the United States District Courts for the Southern and Eastern Districts of New York, the United States Circuit Court of Appeals, Second Circuit, and the United States Supreme Court.

At all of said times, I have resided and still reside, and had, and still have, my office for the practice of my profession in the City and State of New York. My present residence is 111 East 88th Street, in the Borough of Manhattan, City of New York, and my office address is No. 580 Fifth Avenue, in the Borough of Manhattan, City of New York.

267

I am the attorney for the defendant Receiver in the above entitled action, and am also his attorney in an action by said defendant as Receiver, now pending in the Supreme Court of the State of New York, County of New York,

against the defendant ASCAP to recover the indebtedness
268 which is the subject of the second count of the complaint in this action and other sums of money. I was engaged as such attorney by said defendant as Receiver pursuant to an order of the Supreme Court of the State of New York made in the action in which the said defendant was appointed Receiver, a copy of which order, dated the 7th day of July, 1941, is annexed to said defendant Receiver's answer to the complaint herein. Pursuant to said employment in accordance with said order, and pursuant to a further order made in the same action on the 23rd day of July, 1941, granting leave to said defendant as Receiver to com-
269 mence said action against the defendant ASCAP, said action against ASCAP was commenced on July 29, 1941 and I appeared as attorney for this defendant Receiver as plaintiff Receiver therein.

Upon the commencement of the action by Mr. Propper as Receiver against the defendant ASCAP in said New York Supreme Court in July, 1941, long before the United States entered into World War II, I acquired, and continue to have, by the express provisions of Section 475 of the Judiciary Law, a lien upon the subject of the action and the cause of action "from the commencement" thereof, for my services rendered and disbursements incurred there-
270 in. In addition to this said lien upon the cause of action and the subject of the action, I have an attorney's retaining lien upon all papers and documents in my possession relating to the cause of action and the action herein.

Since the commencement of that action considerable services were rendered in numerous proceedings, including examinations before trial, six appeals to the Appellate Division; four of them unsuccessfully taken by defendant

ASCAP as defendant therein, and several hundreds of dollars were advanced by me on account of the Receiver by way 271
of disbursements. I have to this date received nothing for my services or the disbursements thus advanced and incurred by me.

Considering the nature of said litigation, the extent of the services rendered, and the disbursements incurred, and all other facts usually taken into account in determining value of legal services, I verily believe that my lien upon said cause of action would be not less than, and in excess of, one-third (1/3) of the amount to be recovered herein.

By virtue of the provisions of Section 977-b of the New York Civil Practice Act, and Section 475 of the New York 272
Judiciary Law, and the order under which I was employed as attorney for the Receiver, under which said services were rendered and said disbursements were incurred, I have a vested right and interest in all the property and assets in question, including the cause of action against ASCAP, which right and interest were acquired by me before the war. I am not a party to this action and no determination in any way affecting my right and interest can be made herein.

WHEREFORE, I respectfully join in the application of the said defendant Receiver for judgment dismissing 273
the second count in the complaint herein.

A. Walter Socolow

(Sworn to May 28, 1946.)

Notice of Motion of Plaintiff

DISTRICT COURT OF THE UNITED STATES

274 FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE].

The plaintiff, James E. Markham, Alien Property Custodian, on the annexed affidavit of James D. Hill, and on all of the pleadings, affidavits, admissions and papers on file herein, moves the court as follows:

275 1. For an order pursuant to Rule 12(c) of the Rules of Civil Procedure directing judgment on the pleadings in favor of the plaintiff and against the defendant, Henry M. Propper, receiver, or in the alternative,

2. For an order pursuant to Rule 56 of the Rules of Civil Procedure directing summary judgment in favor of the plaintiff and against the defendant, Henry M. Propper, receiver,

on the ground that the pleadings, affidavits, admissions, and other papers now on file herein show that there is no genu-
276 ine issue as to any material fact and that the plaintiff is entitled to a judgment against the defendant, Henry M. Propper, receiver, as a matter of law.

Dated at New York, New York June 20, 1946.

JOHN F. X. MCGOHEY
United States Attorney
United States Court House
Foley Square
New York, New York

Attorney for Plaintiff

STIPULATION

277

It is stipulated and agreed that the court may hear, consider, and determine the above motion for judgment on the pleadings or summary judgment in conjunction with the motion for judgment on the pleadings or summary judgment heretofore filed by the defendant Henry M Propper, receiver, dated May 28, 1946.

JOHN F. X. MCGOHEY
Attorney for Plaintiff

278

A. WALTER SOCOLOW
Attorney for Defendant
Henry M. Propper, receiver

SCHWARTZ & FROHLICH
Attorney for Deems Taylor, as President of the American Society of Composers, Authors, and Publishers, defendant.

279

Affidavit of James D. Hill

DISTRICT COURT OF THE UNITED STATES

280 FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE]

DISTRICT OF COLUMBIA, *ss.*:

JAMES D. HILL, being first duly sworn, deposes and

281 states:

I am attorney for James E. Markham, Alien Property Custodian, the above plaintiff, and as such prepared and caused to be served and filed the petition herein. I have read and am familiar with the answer, motion for judgment on the pleadings or summary judgment and affidavits submitted by the defendant, Henry M. Propper, receiver, and am familiar with the facts material to this action.

At all times material to this motion the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP was and still is an unincorporated associa-

282 tion with principal place of business in the City and State of New York and being organized for the purposes of granting licenses and collecting royalties for the public performance of musical works of its members and allotting and distributing such royalties to its members.

At all times material hereto up to December 31, 1938, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, hereinafter referred to as AKM (state approved society of authors, composers and music

publishers) was a registered cooperative society with limited liability, organized and existing under the laws of the 283
Republic of Austria and being constituted for a similar purpose.

On or about the first day of January 1933 the said ASCAP and AKM entered into a written agreement, the terms of which are not material to this motion. Under the terms of said agreement said ASCAP has collected and retains in its possession for AKM a sum of money not less than $62,809.58.

On June 9, 1941 one Franz Sobotka, a national of Austria, 284
pursuant to §977-b of the New York Civil Practice Act, applied to the Supreme Court of New York for New York County for the appointment of a receiver for the property and assets within the state of New York of A. K. M., alleging that said AKM had been liquidated and had property and assets within the state of New York. Said action, entitled *Sobotka* v. *AKM*, 12719/1941, is still pending in the Supreme Court for New York County. The receiver has reduced no assets to possession and has made no distribution to creditors.

On June 12, 1941, pursuant to said application, Henry M. 285
Propper, the defendant herein, was appointed temporary receiver of the property and assets of AKM within the state of New York by an *ex parte* order signed and entered without notice and which authorized him to "take, receive and reduce to his possession * * * and hold until further orders of this court * * *" the property and assets of AKM within the state of New York. Said order did not purport to invest said temporary receiver with title to said assets.

286 On June 14, 1941, Executive Order No. 8389 was made applicable to property of nationals of Austria, thereby freezing said property and prohibiting the transfer of either title or possession thereto unless licensed.

On July 9, 1941, the said Propper, receiver, served upon the defendant ASCAP a copy of the order appointing him as temporary receiver, together with a written demand for delivery of any and all moneys held by ASCAP for AKM.

On July 29, 1941, the said Propper, as temporary receiver, commenced an action in the Supreme Court of New York for New York County against ASCAP to recover the
287 sum of $150,000 alleged to be due on the written contract between ASCAP and AKM dated January 1, 1933. Said action, which was originally entitled *Propper* v. *Gene Buck, as president of ASCAP*, is now entitled *Propper v. Taylor, as president of ASCAP*, 19537/1941, and is still pending in the Supreme Court of New York for New York County and has not proceeded to trial on its merits.

On September 29, 1941, on default of AKM, Propper was appointed permanent receiver of the New York property and assets of AKM. I specifically deny the statements contained in the affidavits of the receiver that he was "continued" as permanent receiver. His appointment, as is de-
288 scribed by §977-b (10) was an entire new and distinct appointment and had no relation to his prior appointment as temporary receiver.

On November 3, 1941, ASCAP filed its amended answer in the case of *Propper v. Taylor*, asserting that the assets held by it for AKM had been frozen by Executive Order 8389, that the plaintiff had neglected and failed to secure a license authorizing him to receive either title or posses-

sion to said assets, and alleging that the order appointing Propper as receiver was without jurisdiction and in violation of §977-b on the ground that AKM was not a corporation, that Sobotka was not a creditor thereof and that the three year period of limitations within which actions may be commenced under §977-b had elapsed prior to the commencement of the receivership action of *Sobotka* v. *AKM*. These matters have not been determined, and must be determined before final disposition of said action. I specifically deny that the appointments of Propper as temporary and permanent receiver were valid acts, within the jurisdiction of the courts of the state of New York as defined by §977-b. 289 290

Pursuant to the provisions of §977-b of the Civil Practice Act of the state of New York, receivers appointed thereunder are deemed to be in constructive possession of the property and assets of the corporation which is placed in receivership upon the date of delivery to the person, firm, or corporation holding said assets a copy of the order appointing said receiver, together with the demand therefor, which in this case occurred on July 9, 1941, and are deemed to have acquired title to said assets upon the date when the receiver's appointment is made permanent, which in this case occurred on September 29, 1941. I specifically deny and controvert the allegations contained in the answer of the defendant Propper filed herein and in the affidavits filed herein on his behalf in which it is alleged that he obtained title to the New York assets of AKM upon the date of his appointment as temporary receiver on June 12, 1941. 291

Although the said Propper, as receiver, now claims to have acquired title to the funds of AKM held by ASCAP by his appointment as temporary receiver on June 12, 1941

and before Executive Order No. 8389 became applicable to
292 the property of nationals of Austria, this contention is at complete variance with the position he has heretofore taken on this subject. On April 30, 1942 the receiver, through his attorney, by affidavits filed in the action of *Propper* v. *Taylor* now pending in the Supreme Court of New York for New York County, recognized that section 977-b of the Civil Practice Act of New York did not purport to invest him with title to the said property of AKM until his appointment was made permanent on September 29, 1941 and after the effective date of Executive Order No. 8389. Per-
293 tinent extracts from said affidavits are attached hereto, marked Exhibits "A" and "B" and by this reference made a part hereof.

Pursuant to the terms of Executive Order 8389, which became applicable to the property of nationals of Austria on June 14, 1941 and pursuant to the duly issued rules, orders and regulations issued thereunder, any and all transactions involving property in which nationals of Austria have an interest have been prohibited, unless licensed, since that date and are null and void and of no force and effect, including attempted and purported transfers of either title or possession by judicial process, and any and all such
294 transfers before that date, unless licensed, may not be the basis for the assertion of any right or interest in such property unless the person with whom such blocked account is held had written notice of the transfer before the effective date of the Order. Pursuant to the terms of 977-b of the New York Civil Practice Act, the said Propper as receiver was not deemed to have acquired title to the property of AKM until his permanent appointment on September 29, 1941 and the receiver has admitted, both by answer and

affidavit that he did not notify ASCAP, with whom the funds of AKM were held, of his purported transfer until July 9, 1941. Both of these occurrences were after the effective date of Executive Order No. 8389, and his purported and attempted transfer of title was a transaction prohibited by the terms of the Order. Because of such prohibition the receiver was prevented and prohibited from acquiring either title or possession to the funds of AKM. Pursuant to the provisions of Executive Order No. 8389, title of said funds remained in AKM and possession thereof remained in ASCAP at all times until vested by the Alien Property Custodian on September 4, 1943, as hereinafter set forth. The said Propper, receiver, has at no time had any right, title or interest therein but by his cause of action pending in the courts of the State of New York against ASCAP seeks to accomplish a transfer of title and possession forbidden and prohibited by lawful acts and regulations of the United States. 295 296

The said Henry M. Propper, receiver, has not at any time either applied for or been granted a license to engage in any transaction involving any property in which the said AKM has an interest, nor to do any other act prohibited by the terms of Executive Order No. 8389, nor has any other person acting on his behalf ever applied for or been granted a license to engage in any transaction involving any property of the said AKM. The certificate of the Division of Foreign Funds Control, Department of the Treasury, certifying these facts, is attached hereto, marked Exhibit "C" and by this reference made a part hereof. 297

At all times material hereto, ASCAP, the party with whom said account of AKM has been held, has treated said account as a blocked account, has properly refused to make

payment therefrom without license, and in its answer to
298 the action of *Propper* v. *Taylor* has specifically alleged and pleaded that said account had been frozen and blocked by the terms of Executive Order No. 8389, and that the plaintiff Propper had neglected and failed to obtain a license authorizing him to acquire title or possession to said account.

On September 4, 1943 the Alien Property Custodian, acting under authority duly delegated to him by the Trading with the Enemy Act and by Executive Order No. 9095, as amended, issued his Vesting Order No. 2097, filed with the
299 division of the Federal Register on December 4, 1943 and published in 8 Federal Register 16463 on December 7, 1943, wherein the Alien Property Custodian vested in himself all of the copyrights of AKM, all rights and claims of AKM thereunder, all contracts of AKM relating to copyrights, all moneys accrued or to accrue thereunder, and any and all causes of action relating to the foregoing. By the same Order the Custodian also vested in himself title to funds held by ASCAP for other European performing rights societies, not material to this motion. By his vesting the Custodian became sole and absolute owner of all the funds and property held by ASCAP for AKM and all rights in
300 and to the cause of action brought by this receiver to recover said funds. The determination of the Custodian that the property so held by ASCAP was the property of AKM is final and conclusive, whether right or wrong, and cannot be contested by the receiver in this proceeding or in the courts of the state of New York. The rights of the receiver, if any he has, are inferior and subordinate to the Custodian's right to be placed in immediate possession of the

funds and property vested by him, and may be asserted solely and only in a suit for return after possession has been duly surrendered to the Custodian, as is provided by sections 9(a) and 7(c) of the Trading with the Enemy Act (40 Stat. 411). A copy of Vesting Order No. 2097 is attached hereto, marked Exhibit "D" and by this reference made a part hereof. 301

On September 11, 1942, the Alien Property Custodian made written demand on ASCAP for delivery of the funds held by it and although ASCAP complied with said demand in part by delivering to the Custodian funds held by it for certain other European performing rights societies, ASCAP has not delivered to the Custodian the funds held by it for AKM, in whole or in part. The Custodian did not serve a demand upon the receiver, as is stated in the receiver's affidavit, for the reason that no demand is necessary to mature the Custodian's legal rights under his vesting orders, and in any event, the receiver has no right, title or interest in and to the funds vested. Even were a demand necessary, the requirement would have been fulfilled by service of a demand on ASCAP, the party in actual possession. 302

Public Law 322—79th Congress, by virtue of which the receiver states that the property of AKM "is not subject to any rights of the Alien Property Custodian", is not material to this action. That law provides only that vested property may be returned to its former owners if the Custodian shall find that the former owner has not been, since December 7, 1941, a citizen or subject of a nation with which the United States has been at war since December 7, 1941, that the return is in the interest of the United States, and 303

304 if certain other findings are made. No such findings have been made as to the vested property of AKM; and indeed, the Act does not apply to such property, as it applies only to property which has been surrendered and delivered to the Custodian. The Act is not, in any sense, a self-executing abandonment of vested property; it creates no rights in AKM or this receiver, and does not impair the right and duty of the Custodian to reduce the vested property of AKM to possession.

I specifically deny that the receiver's attorney has, or has ever had, any valid attorney's lien upon the funds of 305 AKM which have been vested by the Alien Property Custodian; and state that his client, the receiver, does not have, and has never had, a valid cause of action against ASCAP to recover said funds, nor has he ever had any right, title, or interest therein. He has, at all times, been prohibited by the terms of Executive Order No. 8389 from ever having any interest therein, and his attorney has no valid lien therein. Even if the receiver's attorney had a valid lien, it has not been recognized by the Vesting Order of the Custodian. The determination of the Custodian, that the funds and property vested by him are the property of AKM, and not recognizing any interest in this attorney, is final and 306 conclusive. The correctness of this determination cannot be challenged in this proceeding, but only in a suit for return as is provided by sections 9(a) and 7(c) of the Trading with the Enemy Act.

The various creditors who have filed claims in the receivership proceeding, including the receiver's attorney, as set out in the affidavits filed herein by Henry M. Propper, Morris W. Primoff, and A. Walter Socolow, are not necessary nor proper parties to this proceeding. The Alien Property

Custodian is not a creditor in the receivership action, and this action is not a dispute between creditors. The issues herein are between the Custodian and the receiver, as contesting claimants to title to the assets of AKM, and the receiver, by appearing herein, represents his alleged trust estate, and all creditors therein. It is his exclusive right and duty to represent the trust estate in all litigation, and the creditors thereof are parties to such litigation through the receiver. 307

The present action of *Propper* v. *Taylor*, now pending in the Supreme Court of New York for New York County is the sixth action brought in the courts of New York by a small group of persons, all represented by the attorney who represents the receiver herein, attempting to acquire possession of the funds held by ASCAP for AKM. The first of the actions was commenced in February, 1939, soon after Austria had succumbed to the domination of Germany, and AKM became unable to protect its interests here. The first of these actions was entitled *Primoff* v. *AKM*, and resulted in a default judgment in the sum of $989.98, acquired by service upon a former employee of AKM who had been discharged in 1938. Supplemental proceedings were then instituted against ASCAP (*Primoff* v. *AKM and Gene Buck, as president of ASCAP*, 2457/1940) in which ASCAP answered, asserting the invalidity of the default judgment, and the case has not been further prosecuted. The case of *Leo Ascher, Herman Leopoldi, Franz Sobotka and Ladislas Synes* v. *AKM* (6924/1940) also resulted in default judgment against AKM, in the sum of $89,739.03. Supplementary proceedings were again commenced against ASCAP (*Ascher et al.* v. *Buck*) defendant's motion for summary judgment, attacking the default judgment on jurisdictional 308 309

grounds, was sustained, and the action dismissed. The re-
310 ceivership action of *Sobotka* v. *AKM* and the action of *Propper* v. *Taylor* are still pending. It is the public policy and foreign policy of the United States, as expressed by Executive Order No. 8389 and the Trading with the Enemy Act, to vest title to enemy and foreign property in the United States or, by freezing, to protect it for ultimate return to its rightful owners. The present actions by this small group of creditors and ex-members of AKM, seeking to acquire title to all of the assets of AKM to the exclusion of the United States and all other creditors and members
311 of AKM, collides with and subtracts from the policies of the United States, as expressed by lawful acts and orders thereof, and must yield thereto.

The jurisdiction of this court to determine and adjudicate the lack of interest of the said Propper, receiver, in and to the property of AKM which is the subject of this action is secured by section 24(1) of the Judicial Code and by section 17 of the Trading with the Enemy Act. Since the issuance of Vesting Order No. 2097 on September 4, 1943, ASCAP has delivered to the Custodian large sums of money which it has collected for foreign performing rights societies, and which had been vested by Vesting Order No.
312 2097, but at all times has refused to deliver to the Custodian the money collected by it for AKM, on the ground that this receiver had subjected it to suit to recover the same funds. For a period of almost three years the continued action of this receiver has prevented the United States from being placed in possession of its property, which was vested for the purpose of enabling the United States to more effectively wage war against its enemies. The Alien Property Custodian is entitled to immediate possession of the prop-

erty he has vested; the said Propper, receiver, has no right, title or interest therein and further continuance of his "action against ASCAP in the courts of the State of New York will serve only to harass the defendant ASCAP and to subject it to two actions and possibly to two judgments for the same property and will impede, delay, and impair the ability of the United States to effectuate its powers to wage war and to conduct foreign affairs. The Custodian is not a party to the state receivership action of *Sobotka* v. *AKM*, nor to the state court action of *Propper* v. *Taylor*, and in the latter case the Appellate Division has held that the state court "had no jurisdiction of the Alien Property Custodian and no power to make any adjudication affecting his title to the cause of action." (*Propper* v. *Taylor*, Appellate Div., 1st Dept., April 19, 1946.) This court alone has jurisdiction of all the parties and the subject matter. The jurisdiction of this court is invoked to terminate the harassment and interference caused by the receiver, and the decision of this court, when entered, will be final and binding on all parties and will control further proceedings brought by the defendant Propper in the courts of the state.

313

314

/s/ JAMES D. HILL

315

(Sworn to June 19, 1946.)

EXHIBIT A ANNEXED TO AFFIDAVIT OF JAMES D. HILL

316

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Supreme Term Part I

Papers Submitted
April 24, 1942
Numbered 4.

317

HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against—

GENE BUCK, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

318

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes and says: I am the attorney for the plaintiff in the above entitled action. * * *

The plaintiff was appointed Temporary Receiver, pursuant to Section 977-b of the Civil Practice Act which au-

thorizes the appointment of a receiver when a foreign corporation has been dissolved, liquidated or nationalized and has assets or property of any kind within this State. Subdivision 19 of said section as amended by Laws of 1941, Chapter 926, May 1, provides, among other things, that the liquidation or dissolution of such corporation in the country of its domicile or any confiscatory law or decree thereof has no extraterritorial effect or validity as to property or choses in action within the State or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in this State. The action in which plaintiff was appointed Temporary Receiver resulted in a final judgment appointing plaintiff Permanent Receiver and establishing the fact of the liquidation and dissolution of AKM (on which the jurisdiction of the Court to make said judgment was based under Section 977-b of the Civil Practice Act). Said judgment also establishes the title of the plaintiff as such receiver to the assets of AKM, including the amounts here sued for, free from any effect of such dissolution and liquidation of AKM in the country of its domicile or any confiscatory law or decree thereof as provided in Subdivision 19 of said Section 977-b. * * *

319 320 321

(S) A. Walter Socolow

Sworn to before me this
20th day of April, 1942.

(S) Ruth Steigman
Notary Public, New York County
N. Y. Co. Clk's No. 349 Reg. No. 38767
Commission expires March 30, 1943.

EXHIBIT B ANNEXED TO AFFIDAVIT OF JAMES D. HILL

322 SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Supreme Term Part

Papers Submitted
April 24, 1942
Numbered 18.

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323 HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against—

GENE BUCK, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

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324 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes and says:

* * * * *

Moreover, the record of this Court show that the action in which plaintiff was appointed Temporary Receiver resulted in a final judgment appointing plaintiff Permanent Receiver and establishing the fact of the liquidation and dissolution of AKM (on which the jurisdiction of the Court to make said judgment was based under Section 977-b of the Civil Practice Act). Said judgment also established the title of the plaintiff as such Receiver to the assets of AKM, including the amounts here sued for, free from any effect of such dissolution and liquidation of AKM in the country of its domicile or any confiscatory law or decree thereof, as provided in subdivision 19 of said Section 977-b. 325 326

(S) A. Walter Socolow

Sworn to before me this
20th day of April, 1942.

(S) Ruth Steigman
Notary Public, New York County
N. Y. Co. Clk's No. 349 Reg. No. 38767
Commission expires March 30, 1943.

327

EXHIBIT C ANNEXED TO AFFIDAVIT OF JAMES D. HILL

328 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

JAMES E. MARKHAM,
Alien Property Custodian,

Plaintiff,

—v.—

329 DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an Unincorporated Association of more than seven members,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York, of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendants.

330 Pursuant to Rule 44(b) of the Rules of Civil Procedure, I, Edward W. O'Flaherty, state that I am Special Assistant to the Director and Executive Officer of Foreign Funds Control, Treasury Department, Washington, D. C., and as such have custody of the records and files of Foreign Funds Control and that I have caused diligent search to be made of the records and files of Foreign Funds Control and have found no record that either Franz Sobotka or Henry M. Propper, receiver, has, at any time, applied for or been

Exhibit C Annexed to Affidavit of James D. Hill

granted a license to engage in any transaction involving any property in which Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., has any interest, or that either of them applied for or has been granted a license to engage in any transaction involving the property of any foreign national, or to do any other act prohibited by the terms of Executive Order No. 8389, as amended, or that any other person, firm, corporation, or judicial officer ever applied for or has been granted a license to engage in any transaction involving any property of the said A. K. M.

331

June 12, 1946

332

(s) EDWARD W. O'FLAHERTY

June 12, 1946

I, F. A. Birgfeld, Chief Clerk of the Treasury Department, Washington, D. C., certify that Edward W. O'Flaherty, Special Assistant to the Director and Executive Officer of Foreign Funds Control, Treasury Department, Washington, D. C., has custody of the records and files of Foreign Funds Control.

333

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

SEAL

By direction of the Secretary of the Treasury:

/s/ F. A. BIRGFELD
Chief Clerk, Treasury Department.

EXHIBIT D ANNEXED TO AFFIDAVIT OF JAMES D. HILL

334

UNITED STATES OF AMERICA

OFFICE OF ALIEN PROPERTY CUSTODIAN

Vesting Order Number 2097

Re: Certain rights under copyrights in which interests are held by foreign nationals

Under the authority of the trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation:

335

1. Finding that each organization listed in Exhibit A attached hereto and by reference made a part hereof is organized under the laws of, and has its principal place of business in, and is a national of, the foreign country appearing after its respective name;

2. Finding that the members of the organizations listed in the said Exhibit A are residents of and therefore are nationals of foreign countries;

3. Finding that the property described in subparagraph 4 hereof is property of the organizations to which

336

reference is made in said Exhibit A and/or each and every member thereof;

4. Determining that the property described as follows: All right, title, interest and claim of whatsoever kind or nature, under the statutory and common law of the United States and of the several States thereof, of the organizations to which reference is made in said Exhibit A, and/or each and every member thereof, in, to, and under the following:

Exhibit D Annexed to Affidavit of James D. Hill

a. Every right under copyright, claim of copyright or right to copyright in and for the non-dramatic performance for profit of any and all musical compositions in which such rights are held by the organizations to which reference is made in said Exhibit A and every member thereof, 337

b. Every license, agreement, privilege, power and right of whatsoever nature arising under or with respect to any or all of the foregoing; excepting the rights of any person to renew any or all of the copyrights arising in, from or under any or all of the foregoing, 338

c. All monies and amounts, and all right to receive monies and amounts, by way of royalty, share of profits or other emolument, accrued or to accrue, whether arising pursuant to law, contract or otherwise, with respect to any or all of the foregoing,

d. All rights of reversion or revesting, if any, in any or all of the foregoing,

e. All causes of action accrued or to accrue at law or in equity with respect to any or all of the foregoing, including but not limited to the right to sue for and recover all damages and profits and to ask and receive any and all remedies provided by common law or statute for the infringement of any copyright or the violation of any right or the breach of any obligation described in or affecting any or all of the foregoing, 339

is property payable or held with respect to copyrights, or rights related thereto, in which interests are held

by, and such property constitutes interests held therein
340 by nationals of foreign countries,

5. Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise; and

6. Deeming it necessary in the national interest;

hereby vests in the Alien Property Custodian the property hereinbefore described in subparagraph 4, to be held, used,
341 administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States;

Such property, and any or all of the proceeds thereof, shall be held in an appropriate special account or accounts, pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return should be made or such compensation should be paid.

342 Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

Exhibit D Annexed to Affidavit of James D. Hill

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order. 343

Executed at Washington, D. C. on September 4, 1943.

(Official seal)

(Signed) LEO T. CROWLEY

LEO T. CROWLEY
Alien Property Custodian

[F. R. Doc. 43-19387; Filed, December 4, 1943; 11:04 a. m.]
[8 Fed. Reg. 16463 (December 7, 1943)] 344

345

Exhibit D Annexed to Affidavit of James D. Hill

EXHIBIT A

	Name of organization	Last known principal place of business
346	Staatlich Genehmigte Gesellschaft Der Autoren, Komponisten Und Musikverleger (AKM)	Vienna, Austria
	Association Coop. Bulgare Pour La Protection Des Droits D'Auteur (AVTOR)	Sofia, Bulgaria
	Ochranne Sdruzeni Autorske (OSA)	Praha, Czecho Slovakia
347	Internationalt Forbund Til Beskyttelse Af Komponistrettigheder I Danmark (KODA)	Copenhagen, Denmark
	La Societe des Auteurs Compositeurs et Editeurs de Musique (SACEM)	Paris, France
	Staatlich Genehmigte Gesellschaft Zur Verwertung Musikalischer Urheberrechte (STAGMA)	Berlin, Germany
348	Magyar Szovegirok, Zeneszerzok Es Zenemukiadok Szovetkezete (MARS)	Budapest, Hungary
	Societa Italiana Degli Autori Ed Editori (SIAE)	Rome, Italy
	Ente Italiano Per Il Diritto Di Autore (EIDA)	Rome, Italy
	Udruzenje Jugoslovenskih Muzickih Autora (UJMA)	Zagreb, Jugoslavia
	Societatea Compozitorilor Romani (SOCORO)	Bucarest, Rumania

Affidavit of Herbert P. Jacoby

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action—File No. 35-581

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HERBERT P. JACOBY, being duly sworn, deposes and says:

I am a member of the firm of Schwartz & Frohlich, attorneys for defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP).

This affidavit is submitted in connection with the motion of defendant Henry M. Propper, as Receiver of the property and assets within the State of New York of an Austrian organization commonly known as A. K. M. wherein said defendant seeks an order pursuant to Rule 12, subdivision c for judgment on the pleadings with respect to the second count in the complaint or in the alternative, for an order pursuant to Rule 56 granting him summary judgment with respect thereto.

While no affirmative relief is sought in said application as against defendant ASCAP that defendant has a vital interest in the disposition thereof. Accordingly, this affidavit is submitted for the purpose of setting forth defendant ASCAP's position on this motion.

Defendant ASCAP is an unincorporated association created under and pursuant to the laws of the State of New York and engaged in the business of exploiting the public performing rights in and to the musical compositions composed, published or copyrighted by its members. On January 1, 1933 this defendant entered into a written contract with an Austrian organization commonly known as A. K. M. which had been organized for the purpose of protecting the performing rights to Austrian musical works. Under that contract ASCAP granted to A. K. M. the exclusive right to license the public performing rights of the music in its repertoire in Austria and A. K. M. reciprocally granted to ASCAP similar rights in its catalogue of musical compositions for the territory of the United States. Each of the parties agreed to account to the other on the basis of a formula set forth in the contract.

In June, 1941, one Franz Sobotka, a former member of A. K. M. brought a proceeding in the Supreme Court of the State of New York under and pursuant to Section 977-b of the Civil Practice Act for the purpose of obtaining the appointment of a Receiver of the property of A. K. M. within the State of New York. His petition alleged that A. K. M. had been dissolved, liquidated or nationalized and that there were assets within the State of New York belonging to A. K. M. or its membership. On June 12, 1941 an ex parte order was entered appointing defendant Henry M. Propper as temporary Receiver.

On July 9, 1941 defendant Propper caused to be served upon defendant ASCAP a written demand to pay over to him in his capacity as temporary Receiver of A. K. M. any and all moneys due and payable from ASCAP to A. K. M. under the agreement of January 1, 1933. Since it claimed

and still claims to owe nothing to A. K. M.; defendant ignored the aforementioned demand. 355

Thereafter and on July 29, 1941 defendant Propper instituted an independent action in the Supreme Court of New York County against defendant ASCAP in which he sought to recover the sum of One Hundred Fifty Thousand ($150,000) Dollars for the alleged breach by defendant ASCAP of the aforementioned contract of January 1, 1933. At that time the proceeding for the appointment of a Receiver was still pending. Some time thereafter A. K. M. defaulted in the receivership proceeding instituted by Sobotka and a final judgment was entered against it on September 29, 1941 under which defendant Propper was appointed permanent Receiver of its assets within the State of New York. No attempt however was ever made to substitute the permanent Receiver for the temporary Receiver in the action which had been brought against defendant ASCAP. 356

Shortly after issue was drawn in the action brought by Propper in his capacity as temporary Receiver against defendant ASCAP, the war in Europe broke out. On April 11, 1942 defendant ASCAP sought an order staying Propper from the further prosecution of his action until three months after the termination of the state of war then existing between the United States and Germany. That application was granted by order dated May 16, 1942 which was subsequently affirmed by the Appellate Division on February 6, 1943 (*Propper* v. *Taylor*, 265 App. Div. 1040). 357

While the aforementioned stay was in force and effect, the United States Alien Property Custodian by order dated September 4, 1943, and acting under the authority of the Trading with the Enemy Act and Executive Order 9095,

358 purported to seize all of the property of A. K. M. in the United States, as well as the property of a number of other European Performing Rights Societies. The order issued on that date is known as Vesting Order 2097 and a copy thereof is annexed to the complaint herein. Shortly thereafter the Alien Property Custodian made written demand upon defendant ASCAP to turn over to him any and all property belonging to defendant A. K. M.

By reason of the pendency of the action brought by defendant Propper in the Supreme Court, New York County, which related to the identical subject matter as that contained in the demand of the Alien Property Custodian, de-
359 fendant ASCAP found itself confronted with two conflicting claims. Since it denied any obligation whatsoever to A. K. M., it was unable to extricate itself from this unenviable position by paying a sum of money into court and interpleading the conflicting claimants.

Taking the position that by virtue of Vesting Order 2097 the Alien Property Custodian had become entitled to possession of any property in the United States belonging to or claimed by or on behalf of A. K. M., defendant made a motion for summary judgment in the State Court action instituted by defendant Propper. That application was
360 disposed of in an opinion written by Mr. Justice Walter which is reported in 186 Misc. 70.

In effect Mr. Justice Walter held that even though title to the subject matter of the State Court action had become vested in the Alien Property Custodian, defendant ASCAP was not entitled to summary judgment by reason of the fact that, under Section 83 of the Civil Practice Act, the action might be continued by the original party plaintiff, unless the court directed the person to whom interest had

been transfefred *pendente lite* to be substituted in the action or joined as a co-plaintiff. Accordingly, defendant 361
ASCAP's motion for summary judgment in the State Court action was denied, without prejudice to an application to bring in the Alien Property Custodian as a party plaintiff.

Thereupon, defendant ASCAP made a motion, pursuant to Sections 83 and 210 of the Civil Practice Act, to substitute the Alien Property Custodian as party plaintiff in the State Court action in place and instead of defendant Propper. Notice of that application was given to the Alien Property Custodian and he appeared specially for the purpose of contesting the Court's jurisdiction over him. That 362
motion was likewise decided by Mr. Justice Walter in a written opinion which is reported in 186 Misc. 72.

In his second opinion Mr. Justice Walter denied the motion for substitution and in lieu thereof directed that "unless the Custodian shall voluntarily procure himself to be made co-plaintiff in this action" within a specified period of time "he will be barred and foreclosed of any and all right, title and interest in the subject matter of this action". An appeal was then taken by both the Alien Property Custodian and the defendant ASCAP to the Appellate Division which on April 18, 1946 reversed the ruling of Mr. 363
Justice Walter on the ground that the State Court had no jurisdiction over the Alien Property Custodian and could make no order affecting his title to the property of A. K. M. in the United States.

A few days thereafter the Alien Property Custodian instituted this action wherein he named both ASCAP and Propper as parties defendant. In the second count of his complaint he seeks a money judgment against defendant

364 ASCAP and also a declaration that defendant Propper has no interest in any such recovery.

Defendant Propper has interposed an answer in which he asserts a number of affirmative defenses all directed to the second count of the instant complaint which is the only one in which he has any interest. The first of those defenses alleges that the complaint against him does not state facts sufficient to constitute a cause of action; the second alleges that the court has no jurisdiction over the action; the third alleges that all property of A. K. M. has become irrevocably vested in defendant Propper; the fourth alleges that certain persons who have filed claims in the
365 receivership proceeding are not made parties to this action; and the fifth alleges that the attorneys who appear in the receivership proceeding and in the State Court action brought by Propper against defendant ASCAP and each of whom may have an attorney's lien have not been made parties to this action. The instant motion for judgment on the pleadings or for summary judgment is made in support of those defenses.

Defendant ASCAP has no direct interest in the disposition of defendant Propper's application except insofar as the jurisdiction of this Court to entertain and to ultimately
366 dispose of this action on the merits may be concerned. In fact it is submitted that this Court is the only Court that has jurisdiction over all necessary parties and is the only Court which can render an adjudication on the merits. Both defendant ASCAP and defendant Propper are subject to the jurisdiction of this Court since they are residents of this District. Plaintiff, the Alien Property Custodian has chosen this Court as a forum and thereby has voluntarily submitted himself to its jurisdiction.

The Appellate Division has held that the courts of the State of New York have no jurisdiction over the Alien Property Custodian and can enter no order which can in any way determine his rights with respect to the matter in controversy. Therefore, if defendant ASCAP is to receive any relief from the conflicting claims which have been asserted against it by the plaintiff and by the defendant Propper, it is essential that such relief be afforded by this Court, since *no other Court* has jurisdiction over *all parties* concerned. 367

The claim asserted in the answer of defendant Propper that creditors who have filed claims with him are not made parties to this action and that therefore, there is a defect of parties defendant is wholly without merit. Such creditors are not necessary parties to this action. Their interests, if any, are represented by defendant Propper. Moreover, under the Trading with the Enemy Act all such creditors have the right to file claims with the Alien Property Custodian and to obtain ultimate payment thereof, in the event that the action produces a fund out of which they can be paid. 368

In connection with this defense it is pertinent to note that none of the creditors referred to in the moving papers have been made parties to the State Court action against defendant ASCAP. Certainly, if their interest is sufficient to make them proper parties to an action brought against defendant ASCAP, defendant Propper himself has not recognized that fact. 369

Similarly without merit, is the defense regarding the necessity of joining the attorneys in the receivership proceeding and in the State Court action against defendant ASCAP as parties defendant in this action. They, too,

have the right under the Trading with the Enemy Act to
370 file their claims with the Alien Property Custodian. Moreover, if they or either of them has rendered any actual service in producing a fund for payment of creditors of A. K. M., this Court may make adequate provision for their protection in the final judgment that may be entered herein. There is no necessity that they be made parties defendant to this action for that purpose.

Finally, there is no basis for the claim that the second count of the instant complaint fails to allege a cause of action against defendant Propper. The procedure which the Alien Property Custodian has adopted is fully sus-
371 tained by the recent decision of the Supreme Court of the United States in *Markham* v. *Allen*, 90 L. Ed. 254.

Thus, defendant Propper's application necessarily turns upon the third affirmative defense alleged in his answer wherein the claim is made that he is irrevocably vested with title superior to that of the Alien Property Custodian. On that phase of the case it is unnecessary for defendant ASCAP to take any position at this time, other than to urge that that question be judicially determined, either on this application or after trial.

In this connection it should be pointed out that in order
372 for defendant Propper to succeed he must establish (1) that he was validly appointed as temporary Receiver of A. K. M.; (2) that the "freezing" regulations in effect on July 9, 1941 (when his original demand was served upon defendant ASCAP) do not bar the maintenance of his State Court action; and (3) that Vesting Order 2097 was ineffectual to divest any interest which he may have in the subject matter of that action. Defendant ASCAP always has strongly urged the negative side of all three of the foregoing provisions. It does so at this time.

While defendant ASCAP has consistently maintained that the position asserted by the Alien Property Custodian is the correct one it will at this time leave to the Alien Property Custodian the presentation of the legal basis therefor. Its chief concern presently is that this Court retain jurisdiction of this action for the purpose of making a final determination on the merits. It is submitted that for the reasons hereinabove set forth every effort should be made to protect defendant ASCAP from the conflicting claims which have been asserted against it by plaintiff and by defendant Propper and that this is the only Court which has jurisdiction to do so. 373 374

WHEREFORE, it is respectfully prayed that to the extent that the application of defendant Propper for judgment on the pleadings or in the alternative for summary judgment seeks to attack the jurisdiction of this Court the same should be in all respects denied and that jurisdiction should be retained for the purpose of making a final determination upon the merits either upon this application or upon an ultimate trial.

HERBERT P. JACOBY

(Sworn to June 13, 1946.) 375

Affidavit of A. Walter Socolow

376 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK;
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes
377 and says:

I am the attorney for Henry M. Propper, as Temporary and Permanent Receiver and the defendant in the above entitled action.

This affidavit is submitted in opposition to the motion of the plaintiff Alien Property Custodian for judgment on the pleadings or summary judgment against the said defendant Receiver. It is stipulated and agreed that said motion for judgment on the pleadings or summary judgment be heard, considered and determined "in conjunction with the motion for judgment on the pleadings or summary judg-
378 ment heretofore filed by defendant Henry M. Propper, receiver, dated May 28, 1946." Accordingly, I respectfully refer to, and by such reference incorporate as a part of this affidavit with the same force and effect as if they were hereto annexed, all the papers and exhibits submitted on Mr. Propper's motion for judgment on the pleadings or summary judgment dismissing the complaint, including the answer of Mr. Propper and the exhibits thereto annexed.

The facts herein are all admitted and based solely upon documentary proofs of record, all undisputed, and, therefore, this affidavit will be confined solely to the following headings: 379

1. *The Public and Foreign Policy of the United States.*

At the top of page 9 of his affidavit, Mr. Hill states:

> "It is the public policy and foreign policy of the United States, as expressed by Executive Order No. 8389 and the Trading with the Enemy Act, to vest title to enemy and foreign property in the United States or by freezing, *to protect it for ultimate return to its original owners.*" 380

That is not the public policy and foreign policy of the United States. It has never been and it is not the policy of the United States to protect foreign nationals, some of whom were our enemies, as against the creditors of such nationals who are citizens of the United States. The public and foreign policy of the United States, as expressed in Order No. 8389 and the Trading with the Enemy Act, as shown by the authorities, has been repeatedly expressed by the Executive and Congress, and certainly by our courts, to be to prevent local property of foreign nationals from falling into the hands of our enemies or potential enemies, *and to protect American creditors who may have claims against such property.* Indeed, the regulations under Order No. 8389 expressly provide: 381

> "(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any

382 action or proceeding in any Court within the United States shall be, so far as affected by the Order and/or this general ruling, *valid and enforceable* for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; provided, however, that no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

383 It is clear from the foregoing that nothing in the Order No. 8389, or the regulations thereunder, in any way conflicts with the statutes and public policy of the State of New York under Section 977-b. In fact, the regulations expressly affirm the provisions of 977-b and the policy of the State thereunder.

II. *Title and Rights of Defendant Receiver Under Section 977-B.*

384 At the middle of page 2 of his affidavit, Mr. Hill, referring to the order appointing Mr. Propper Temporary Receiver on *June 12, 1941*—prior to the War and even prior to Executive Order No. 8389—states:

> "Said order did not purport to invest said Temporary Receiver with title to said assets."

A copy of the order, annexed to the answer of the defendant Receiver, is before the Court in its entirety. There is

no question about its being a true, correct and complete copy. Its provisions and interpretation are for the Court. Suffice it to say that said order on its face shows that it was made pursuant to Section 977-b. 385

Referring to Section 977-b, Mr. Hill, at the foot of page 3 of his affidavit, states that "receivers appointed thereunder are deemed to be in constructive possession of the property and assets of the corporation * * * and are deemed to have acquired title to said assets upon the date when the receiver's appointment is made permanent, which in this case occurred on September 29, 1941".

That conclusion is belied by the express provisions of Section 977-b. Subdivision 4 of said Section provides "for the appointment of a temporary receiver pending the determination of the action" whom "the Court *must* thereupon appoint" and who "shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible or intangible, in the State of New York of said foreign corporation and hold the same until the further order of the Court." 386

Subdivision 19 of said Section 977-b expressly provides that "*title to* all assets, credits, *choses in action* and property, tangible and intangible, of any kind and every kind whatsoever * * * *shall immediately vest* in the receiver *upon the making of the order appointing him.*" Thus, by the express terms of the statute, title vested immediately in the Receiver "*upon the making of the order*" (not from the judgment thereafter entered). 387

In fact, Section 12 of said Section expressly provides:

> "*Any receiver* appointed *pursuant to this section* shall have all the powers and duties, in addition to

388 those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the State of New York."

"Any receiver" includes a temporary receiver provided for in Subdivision 4 thereof.

III. *The Only Determination and the Only Rights Acquired by Plaintiff Custodian Are Set Forth in Order #2097.*

389 Near the top of page 6 of his affidavit, Mr. Hill refers to the vesting order "wherein the Alien Property Custodian vested in himself all the copyrights of AKM, all rights and claims of AKM therein, all contracts of AKM relating to copyrights, and moneys accrued or to accrue thereunder and any and all causes of action relating to the foregoing".

This is a distortion of the Custodian's order No. 2097, a copy of which is annexed to Mr. Hill's affidavit. The vesting and determining part of that order appears in paragraph 4 thereof. That paragraph shows by its very terms that the order is limited "to all right, title and interest and claim of whatsoever action or nature under the statutory or common law of the United States and of the several 390 states thereof" which the European societies therein referred to had on the date of the order "in, to and under" the items enumerated "a" to "e" therein.

In other words, the Custodian's determination and vesting here did not extend to any specific copyrights, contracts, etc., but was limited "to all right, title and interest and claim" which the foreign nationals *then had* "in, to and under" such copyrights, contracts, etc.

This acknowledges that the only determination and vesting made by the Custodian's order so far as the subject of Count 2 is concerned, is expressly limited to the balance remaining in the hands of the defendant Receiver upon distribution under Section 977-b. For this the only remedy of the Custodian under the authorities is to proceed by filing a claim with the Receiver. 391

IV. *The Rights of Creditors Who Filed Claims Against the Receiver and the Liens of the Receiver's Attorneys:*

A position is here boldly taken on behalf of plaintiff Custodian that the various creditors who filed claims with defendant Receiver, as well as the Receiver's attorneys, have no rights whatsoever. Nevertheless, they are all denied even the right of a day in Court. It is asserted near the top of page 8 of Mr. Hill's affidavit that these various creditors and claimants who filed claims with the Receiver, and the attorney for the defendant Receiver, "are not necessary nor proper parties to this proceeding". Suffice it to say such a conclusion is in direct variance with the decision of the Supreme Court of the United States in *United States* v. *Bank of New York & Trust Company*, 296 U. S. 463, 480-481. 392 393

V. *An Astounding Assertion in the Custodian's Moving Papers.*

Near the foot of page 9 of his affidavit, Mr. Hill makes the following assertion:

"For a period of almost three years the continued action of this receiver has prevented the United States

394 from being placed in possession of its property which was vested for the purpose of enabling the United States to more effectively wage war against its enemies."

This receiver was first appointed as early as June 12, 1941, long prior to World War II, and even prior to Executive Order No. 8389. Plaintiff Custodian did not commence to function until long afterwards and did not issue the alleged vesting order in question until September 4, 1943, which he filed on December 4, 1943—*more than two and one-half years ago.* Nevertheless, all that this Custodian did
395 under that vesting order was to serve a demand upon ASCAP—nothing else. Admittedly, no demand was served by the Custodian upon defendant Receiver. The only excuse offered is that no such demand was necessary. That, of course is for the Court to say, but the fact is that the failure to serve a demand belies any lack of knowledge as to the status of the receivership. No such lack of knowledge is asserted. In any event, nothing was done until the institution of this action by the Custodian on April 22, 1946.

Indeed, the reason for this inaction on the part of the Custodian is because the Custodian himself by the very
396 terms of his vesting order has recognized the validity of the status of Mr. Propper as receiver and his title to the cause of action pleaded in Count 2.

VI. *The Trial in the State Court Is Imminent.*

At the foot of page 3 of his affidavit, Mr. Jacoby, one of the attorneys for defendant ASCAP, refers to the stay of defendant Receiver's action against ASCAP until three months after the termination of the state of war then exist-

ing between the United States and Germany, which was obtained on the pretense of the necessity for securing evi- 397
dence from abroad in order to defend said action. Mr. Jacoby, however, fails to inform the Court of the reason for that stay, and further fails to disclose *that the stay has since January, 1946 been vacated and the case restored to the February, 1946 calendar for trial. The order vacating the stay was unanimously affirmed by the Appellate Division* (Propper v. Taylor, App. Div., 1st Dept., April 16, 1946); and the trial of this action has since been and is from time to time adjourned because of the pendency of this action.

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VII. *The Proceedings Which Resulted in This Action.*

In an effort to frustrate and avoid a trial of the Receiver's action against it in the State Court, ASCAP first made a motion for summary judgment based on Order #2097 of the Alien Property Custodian. That motion having been denied, ASCAP made a motion to substitute the Alien Property Custodian as plaintiff in the action instead of the defendant Receiver. *Notice to the Alien Property Custodian of such motion was given by mail.* The Alien Property Custodian appeared specially on that motion and 399
objected to the jurisdiction urging *as the ground that no proper service was made.* A copy of the Custodian's special appearance and affidavits in opposition to said motion is hereto annexed and made part hereof and marked "Exhibit A".

Referring to ASCAP's motion for summary judgment, Mr. Jacoby, at the foot of page 4 and top of page 5 of his affidavit, says:

"In effect Mr. Justice Walter held that even though
400 title to the *subject matter of the State Court action had become vested in the Alien Property Custodian*, defendant ASCAP was not entitled to summary judgment by reason of the fact that, under Section 83 of the Civil Practice Act," * * *

Let Mr. Justice Walter himself answer. He says (186 Misc. 72):

"What I wrote in connection with the denial seems to have been interpreted by the parties as a holding
401 that the cause of action has vested in the Custodian, but I certainly had no thought of making any definitive ruling on that point. Even if my language were susceptible of such interpretation it would be purely dictum because that point was not necessarily involved in a disposition of the motion.

"* * *" The request for his substitution is therefore denied."

Mr. Justice Walter further said:

"On the contrary, without attempting any definite
402 determination as to the effect of the order by which the Alien Property Custodian has sought to vest this cause of action in himself, I think it is at least safe to say that if the Custodian takes the cause of action at all, *he must take it in the plight and condition in which it was when he attempted to take it; and as applied to this case that means that he takes it as one upon which a suit already had been brought in this court and in*

which rights by way of an attorney's lien and possibly otherwise have been acquired by the institution of the action." 403

Referring to Custodian's special appearance and opposition, Mr. Justice Walter said:

"But though the Custodian's official position affords no reason why he should not be joined as a plaintiff, *there may be some substance to his objection that he cannot be brought in upon a mere notice of motion served upon him in Washington* (see Matter of Matheson's Estate, 265 N. Y. 81, 86, 87, 191 N. E. 842, 844, 845), and for that reason I think that instead of granting the motion directly the preferable practice is to adopt the procedure frequently resorted to to compel the United States and the State of New York to come in and assert any claim they have or be barred from ever asserting any claim. See cases cited in Matter of De Rario, Inc., 182 Misc. 427, 429, 43 N. Y. S. 2d 918, 920. 404

"The motion is accordingly granted to the extent only of directing that unless the Custodian shall voluntarily procure himself to be made a co-plaintiff in this action within sixty days after service upon him of a copy of the order hereon with notice of entry thereof, he will be barred and foreclosed of any and all right, title or interest in the subject matter of this action." 405

The order rendered on said decision was modified upon appeal by eliminating the provision directing the Alien Property Custodian to join as co-plaintiff and as modified

was affirmed. (Propper v. Taylor, App. Div., 1st Dept., April 16, 1946).

406

It is clear that the Appellate Division affirmed the denial of the motion to substitute and eliminated the provision as to the Alien Property Custodian joining as co-plaintiff because of the Custodian's objection to the propriety of *the service by ASCAP of the moving papers upon Custodian.* It should be noted that it was on the *same day* that the Appellate Division unanimously affirmed the order vacating the stay and restoring the case to the trial calendar and permitting the Receiver forthwith to proceed with the trial in his action against ASCAP. Immediately, and on

407

April 22, this action was commenced.

VIII. *Unwarranted Conclusions in Mr. Hill's Affidavit.*

At the middle of page 4 of his affidavit, Mr. Hill makes the assertion that the attorney for the defendant Receiver has heretofor recognized that title did not vest in the Receiver until after judgment in the Sobotka action, and seeks to bolster that assertion by attaching extracts from but two affidavits used in the action by this defendant Receiver against ASCAP. An examination of these affidavits, however, does not bear out that contention. All that is

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stated in these extracts is that the judgment in the Sobotka action "*also* establishes the title of the plaintiff as such receiver". The word "also" cannot be deemed a word of limitation; it confirms the earlier vesting of title. In fact, scores of affidavits used in the action by the defendant Receiver against ASCAP since the very outset asserted consistently that title vested in the Receiver from the date of his appointment as temporary receiver on June 12, 1941. The very complaint in the action by this defendant Receiver against

ASCAP, and served as early as July 29, 1941, was predicated upon express allegations that title "vested in the plaintiff as such temporary receiver immediately upon the making of the order appointing him as such temporary receiver". 409

At the top of page 3 of his affidavit, Mr. Hill states that Mr. Propper was not "continued" as permanent receiver but that his appointment as permanent receiver under the final judgment in the Sobotka action "was an entirely new and distinct appointment". There is no question here that the order appointing a temporary receiver and the final judgment making Propper a permanent receiver were all proceedings in one and the same action rendered in regular course. The effect of the final judgment in subdivision 10 of Section 977-b shows the continuance of the receiver appointed at the commencement of the action. 410

At page 1 of his affidavit Mr. Hill purports to characterize AKM, the Austrian corporation, as an "unincorporated association". He has, however, contradicted this baseless remark not only the allegations of the Custodian's Count 2 but by his own statements at the foot of page 1 of his affidavit where he refers to AKM as "a registered corporative society *with limited liability, organized and existing under the laws of the Republic of Austria*, and being constituted for a similar purpose". The decision of the Appellate Division (263 App. Div. 948) is conclusive and entitled to full faith and credit here. 411

Beginning at the foot of page 9 and continuing at the top of page 10 of his affidavit, Mr. Hill, attorney for the Custodian, states:

> "Further continuance of his (Receiver's) action against ASCAP in the courts of the State of New

York will serve only to harass the defendant ASCAP
412 and to subject it to two actions and possibly to two judgments for the same property and will impede, delay, and impair the ability of the United States to effectuate its powers to wage war and to conduct foreign affairs."

Such an assertion is not in good grace and is certainly unwarranted and unjustified by a governmental official. Plaintiff for three years during the war has made no move whatsoever with respect to the subject of this action, and has only now become aware that there is no war between
413 the United States and Austria. He stoops to ASCAP's tactics to delay the trial in the action against ASCAP. It is obvious that the Custodian and his attorneys are concerned only about the possibility of two judgments against ASCAP and "the ultimate return to the original owners". The Custodian is not in the least interested in giving full faith and credit to the statutes and judicial proceedings of the State of New York or the interests and vested rights acquired thereunder by American citizens who pay the taxes out of which the salaries of his office are paid.

WHEREFORE, I respectfully pray that the motion of
414 the defendant Receiver for judgment on the pleadings or for summary judgment dismissing the complaint, be, in all respects, granted, and that the cross motion of the Custodian for judgment on the pleadings or summary judgment against the defendant Receiver be denied.

A. WALTER SOCOLOW

(Sworn to June 27, 1946.)

EXHIBIT A ANNEXED TO AFFIDAVIT OF A. WALTER SOCOLOW

THE SUPREME COURT 415

COUNTY OF NEW YORK

HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against— 416

DEEMS TAYLOR, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the undersigned, appearing specially for James E. Markham, Alien Property Custodian, will submit the attached affidavit in opposition to the motion of the defendant to substitute the Alien Property Custodian as party plaintiff in this action in place and instead of the present plaintiff, and for the dismissal thereof. 417

Exhibit A Annexed to Affidavit of A. Walter Socolow

Dated: New York, N. Y., 1945.

418

Yours, etc.,

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York.
Appearing specially as attorney for
the Alien Property Custodian.

To:

SCHWARTZ & FROHLICH, ESQS.,
419 *Attorneys for Defendant,*
Office & P. O. Address,
1450 Broadway,
Borough of Manhattan,
City of New York.

A. WALTER SOCOLOW, ESQ.,
Attorney for Plaintiff,
Office & P. O. Address,
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

420

EXHIBIT B ANNEXED TO AFFIDAVIT OF
A. WALTER SOCOLOW

THE SUPREME COURT

COUNTY OF NEW YORK

HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against—

DEEMS TAYLOR, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

WASHINGTON,
DISTRICT OF COLUMBIA, *ss.*:

FRANCIS J. MC NAMARA, being duly sworn, deposes and says:

I am the Deputy Alien Property Custodian and am authorized to exercise any and all of the powers granted and delegated to, conferred upon and vested in James E. Markham, the duly appointed, qualified and acting Alien Property Custodian of the United States of America.

On the 7th day of November, 1945 there was received at our offices in the District of Columbia, by registered mail,

a notice of motion together with an affidavit in support of
424 a motion brought on by the defendant, the purpose of which is to substitute James E. Markham, Alien Property Custodian, as the party plaintiff in place and instead of the present plaintiff in the above entitled action.

As Alien Property Custodian, James E. Markham is an officer of the United States and is not a party to this action at this time, nor does he consent to become a party either plaintiff or defendant, and he objects to the instant motion to substitute him as Alien Property Custodian as the party plaintiff.

FRANCIS J. MCNAMARA,
425 *Deputy Alien Property Custodian.*

Suscribed and sworn to before me
this 16th day of November, 1945.

JOSEPHINE A. STERLING,
Notary Public.

426

Opinion by Coxe, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 35-581

[SAME TITLE]

These are motions (1) by the plaintiff, and (2) by the defendant Propper as Receiver of an Austrian cooperative society known as AKM, for judgment on the pleadings, or in the alternative for summary judgment, with respect to Count No. 2 of the complaint.

The action is brought by the plaintiff, Alien Property Custodian, to recover different sums alleged to be owing by the defendant, American Society of Composers, Authors & Publishers (hereinafter referred to as ASCAP), to three European performing rights societies, respectively. The complaint contends three separate counts, each relating to the sum alleged to be owing by ASCAP to one of these three European societies. Count No. 2 concerns only AKM, the Austrian society for which the defendant Propper is the receiver, and as to that count it is alleged that ASCAP is now holding for AKM the net sum of $62,809.85.

The plaintiff in his motion seeks no affirmative relief against ASCAP but merely asks an adjudication that the defendant Propper as receiver has no right, title or interest in or to the funds held by ASCAP for AKM.

The facts are not in dispute, and may be summarized briefly as follows:

430 ASCAP is an unincorporated association in New York City engaged in the business of granting licenses and collecting royalties for the public performance of the musical works of its members, and alloting and distributing such royalties. Prior to December 31, 1938, AKM was a registered cooperative society with limited liability, organized under Austrian law, and engaged in Austria in the same character of business as ASCAP.

On January 1, 1933, ASCAP entered into a written contract with AKM under which AKM granted to ASCAP the exclusive right to license in the United States and its possessions the non-dramatic public performance for profit of
431 certain musical works, the performing rights of which then were or which during the term of the agreement might be vested in or controlled by AKM. ASCAP agreed to collect from its licensees royalty payments for such public performances, and, on or about the 30th day of September succeeding the close of each calendar year, to account to AKM for collections made for the preceding calendar year, and to remit to AKM the proceeds thereof after deduction of commissions and expenses. This agreement remained in force until December 31, 1938, and the sum of $62,809.85 involved in Count No. 2 is the alleged bal-
432 ance of the collections made by ASCAP for the account of AKM to and including December 31, 1938, after deduction of commissions and expenses.

On June 9, 1941, one Franz Sobotka, a national of Austrial commenced an action in the New York Supreme Court, New York County, against AKM, alleging that it was a corporation organized and existing under the laws of Austria and had been liquidated and had assets within the State of New York, and praying for the appointment of a re-

ceiver of such assets pursuant to Section 977-b of the Civil Practice Act of New York. In that action the defendant 433
Propper, on an ex parte application, was appointed on June 12, 1941, temporary receiver of the property and assets of AKM within the State of New York.

On June 14, 1941, Executive Order No. 8389, which had originally been promulgated by the President on April 10, 1940, was, with amendments, made applicable to Austria (6 F. R. 2897). Under this order the transfer of any property of Austrian nationals was prohibited unless authorized by the Secretary of the Treasury. On July 9, 1941, Propper served on ASCAP written notice of his appointment as 434
temporary receiver, together with a demand for the payment of the funds of AKM held by ASCAP, and on July 29, 1941, Propper as temporary receiver commenced an action in the State court to recover such funds. This action is still pending undetermined in the State court. On September 29, 1941, upon default of AKM, final judgment was entered against it in the receivership action, and Propper was appointed permanent receiver of the property and assets of AKM within the State of New York.

On September 4, 1943, the plaintiff, by vesting order No. 2097 (8 F. R. 16463), determined that the funds held by ASCAP for AKM were the property of AKM, and vested 435
in himself all right, title, interest and claim in and to such funds. On September 11, 1943, the plaintiff made written demand on the defendant ASCAP for the funds held for AKM, and when this demand was refused the plaintiff commenced the present action. The Secretary of the Treasury has at no time licensed or otherwise authorized the transfer of the AKM funds held by ASCAP to the defendant Propper as receiver.

The question is thus presented whether the defendant
436 Propper as receiver of the New York assets of AKM has any right, title or interest in or to the funds held by ASCAP for AKM. This is a question which this court has jurisdiction to determine. See *Markham* v. *Allen*, 326 U. S. 470. It is the contention of the defendant Propper that he acquired title to these funds upon his appointment as temporary receiver on June 12, 1941, but in any event upon his appointment as permanent receiver on September 29, 1941.

The defendant Propper was appointed temporary receiver, and later permanent receiver, in the state court in an
437 action brought against AKM under section 977-b of the New York Civil Practice Act. This section was originally enacted in 1936, and authorized the institution of an action for the appointment of a receiver of the assets in New York State of a foreign corporation which had been dissolved, liquidated or nationalized, or had ceased to do business for any reason. The purpose of the statute was to administer the New York assets of such a corporation and to prescribe a method of distribution, "irrespective of the scheme of distribution promulgated in any other state inclusive of the domicile of the foreign corporation". *Oliner* v. *American-Oriental Banking Corporation*, 252 A. D. 212,
438 aff'd 277 N. Y. 588.

The section authorizes the appointment of a temporary receiver "pending the determination of the action;" it specifies the mode of service of process on the defendant; and it provides for the entry of judgment and the appointment of a permanent receiver upon default of the defendant or after trial. It also provides that any receiver appointed pursuant to the section "shall have all the powers and du-

ties * * * as are possessed by * * * receivers * * * by the laws of the State of New York", and further, that "Title to all assets, credits, choses in action and property * * * within the State of New York shall immediately vest in the receiver upon the making of the order appointing him". 439

I find nothing in the language of this section which departs from the general New York rule, applicable to chancery as well as statutory receiverships, that a temporary receiver does not, by virtue of his appointment, obtain title, but merely a right to possession, *Keeney* v. *Home Insurance Company*, 71 N. Y. 396, 401; *Herring* v. *N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340; *Decker* v. *Gardner*, 124 N. Y. 334. See *New York General Corporation Law*, S. S. 162, 163, 168. I hold, therefore, that the defendant Propper did not acquire title to the funds held by ASCAP for AKM upon his appointment as temporary receiver on June 12, 1941. 440

It remains to consider whether the defendant Propper obtained title to the AKM funds held by ASCAP upon his appointment as permanent receiver on September 29, 1941. On this branch of the case the plaintiff insists that the defendant Propper obtained no such title by reason of the prohibitions of Executive Order No. 8389.

Executive Order No. 8389 became applicable to the property of Austrian nationals on June 14, 1941, and reads in part as follows: 441

Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if * * * (ii) such transactions involve property in which any foreign country designated

442 in this Order, or any national thereof, has at any time on or since the effective date of this order had any interest of any nature whatsoever, direct or indirect: * * *".

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; * * *".

Section 7. Without limitation as to any other powers or authority of the Secretary of the Treasury * * * under any other provision of this Order, the Secretary of the Treas-
443 ury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order * * *".

Clearly, under the language of this Order, any unlicensed transfer of the AKM funds held by ASCAP was expressly prohibited. And this prohibition was as applicable to a transfer by judicial process as to a transfer by voluntary act. Even if there were any doubt on that subject, which I do not entertain, this doubt was completely removed by the interpretative General Ruling No. 12 issued by the Secretary of the Treasury on April 21, 1942 (7 F. R. 2991). Under this Ruling it was provided in Section (1) that any
444 unlicensed transfer of funds, such as involved in the present action, was "null and void"; and in Section (4) that no transfer of such funds by judicial process created a greater right than the owner of the funds could have conferred by voluntary act prior to the issuance of a license. In view

of these prohibitions of the Executive Order I do not think that the defendant Propper obtained any title to the AKM funds held by ASCAP on his appointment as permanent receiver on September 29, 1941. 445

The New York case of *Polish Relief Comm.* v. *Banca Nationala A Rumaniei*, 228 N. Y. 332, relied on by the defendant Propper, is not in conflict with the above conclusion. That case arose on a motion by the defendant, a Rumanian banking corporation, to vacate an attachment obtained by the plaintiff, under which levies were made upon deposits maintained by the defendant in New York banking houses. It was held by a closely divided court that Executive Order No. 8389 did not forbid such an attachment because "The lien of an attachment is always hypothetical in some degree", and "A 'seizure subject to license' was sufficient * * * for the purpose of jurisdiction *in rem* over the deposits in question." All that the case stands for is that in New York a levy upon New York deposits "subject to license" is sufficient to support jurisdiction *in rem*, and is not prohibited by the Executive Order. In the present case the whole question is whether the defendant Propper as receiver has title, and the Polish relief decision made no adjudication of that question. 446

I hold therefore that the defendant Propper as receiver has no right, title or interest in the funds held by ASCAP for AKM. There may be a decree accordingly for summary judgment in favor of the plaintiff against the defendant Propper. 447

January 21, 1947

(sgd.) ALFRED C. COXE,
U. S. D. J.

Order of Substitution

448 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. No. 35-581

[SAME TITLE]

Upon the annexed consent, it is hereby ordered that Tom C. Clark, Attorney General, as successor to the Alien
449 Property Custodian, be substituted for James B. Markham, Alien Property Custodian, as plaintiff in the above entitled action.

Dated: 1st day of November, 1946.

EDWARD A. CONGER
U. S. D. J.

450

Consent

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. No. 35-581

[SAME TITLE]

We hereby consent to the allowance of the foregoing substitution and entry of the above order.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff.

SCHWARTZ & FROHLICH,
Attorneys for the defendant,
Deems Taylor, as President of the
American Society of Composers,
Authors and Publishers.

A. WALTER SOCOLOW,
Attorney for the defendant,
Henry M. Propper; as Receiver of
the property and assets within the
State of New York of Staatlich
Genehmigte Gesellschaft der
Autoren Komponisten und Musik
verleger, commonly known as A. K. M.

Judgment

UNITED STATES DISTRICT COURT

454 SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

[SAME TITLE]

This cause having come on for hearing before the Honorable Alfred C. Coxe, U. S. District Judge, on motions by the plaintiff Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and by the defendant, 455 Henry M. Propper, receiver, for summary judgment against the other, pursuant to Rule 56 of the Rules of Civil Procedure, and the Court having examined the pleadings, affidavits, and papers on file, and having heard the argument of counsel and being otherwise fully advised and satisfied in the premises, and having found that there is no genuine issue as to any material fact to be submitted to the Court, and having concluded that the plaintiff is entitled to judgment against the defendant Henry M. Propper, receiver, as a matter of law;

IT IS ORDERED that the plaintiff's motion for summary 456 judgment against Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., be and the same is hereby in all respects granted, and

IT IS FURTHER ORDERED that the defendant Henry M. Propper's etc. motion for summary judgment be and the same is hereby in all respects denied, and

IT IS FURTHER ORDERED AND ADJUDGED that
the defendant Henry M. Propper, as receiver of the prop- 457
erty and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren Komponisten und Musikverleger, acquired no right, title or interest in or to the funds and property of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, held by the American Society of Composers, Authors and Publishers, by his appointment as receiver by the Supreme Court of New York for New York County, and has no right, title or interest in or to the said funds and property, and

IT IS FURTHER ORDERED AND ADJUDGED that 458
the plaintiff have and recover costs in the sum of $29.48 as taxed, against the defendant Henry M. Propper, of 1 Madison Avenue, New York, N. Y., as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., and that the plaintiff have execution therefor.

Dated: New York, N. Y., February 10th, 1947.

ALFRED C. COXE
U. S. D. J. 459

Notice of Appeal

460 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

[SAME TITLE]

SIRS:

461 Notice is hereby given that Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., one of the defendants above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on the 10th day of February, 1947, and from each and every part, as well as from the whole, thereof.

Dated, New York, February 25, 1947.

462

Notice of Appeal

Yours &c.,

463

A. WALTER SOCOLOW,
Attorney for Defendant,
Henry M. Propper as Receiver, &c.,
Office & P. O. Address:
680 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

HON. JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Plaintiff,
U. S. Courthouse,
Foley Square, New York, N. Y.

464

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y.

465

Designation of Contents of Record by Defendant-Appellant

466 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

467 DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten and Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

468 The defendant-appellant, Henry M. Propper, as Receiver, as aforesaid, designates the following portions of the Record to be contained in the Record on Appeal in the above entitled action:

1. Statement under Rule 15, Subdivision (b).

2. Summons issued April 22, 1946.

Designation of Contents of Record by Defendant-Appellant

3. Complaint filed April 22, 1946 and exhibits thereto annexed, omitting, however, voluminous exhibits "A" and "C" of said complaint relating solely to the first and third counts thereof, but neither of which relates to count "two" which alone affects the said defendant-appellant and is involved in the appeal herein. 469

4. Answer of defendant, Henry M. Propper, as Receiver, as aforesaid, and all exhibits therein referred to and thereto annexed, filed the 13th day of May, 1946.

5. Answer of defendant, Deems Taylor, as President, as aforesaid, filed the 10th day of October, 1946. 470

6. Notice of motion of defendant, Henry M. Propper, as Receiver, as aforesaid, dated the 28th day of May, 1946.

7. Affidavit of Henry M. Propper in support of said motion, sworn to the 28th day of May, 1946.

8. Affidavit of Morris Primoff in support of said motion and the exhibit thereto annexed, sworn to the 27th day of May, 1946.

9. Affidavit of A. Walter Socolow, in support of said motion, and the exhibit thereto annexed, sworn to the 28th day of May, 1946. 471

10. Notice of cross-motion by James E. Markham, the original plaintiff, dated the 20th day of June, 1946, and stipulation thereto attached.

11. Affidavit of James D. Hill, sworn to the 19th day of June, 1946, and exhibits therein referred to and thereto attached.

12. Affidavit of Herbert P. Jacoby, sworn to the 13th day
472 of June, 1946.

13. Affidavit of A. Walter Socolow, sworn to the 27th day of June, 1946, and all exhibits therein referred to and thereto attached.

14. Opinion of Coxe, U. S. D. J., dated the 27th day of January, 1947.

15. Final judgment appealed from, dated the 10th day of February, 1947, entered the 15th day of February, 1947.

473 16. Notice of appeal, filed February 28, 1947.

17. This designation.

18. Designation by Appellee, if any, of additional papers to be included in the Record.

19. Designation by defendant Deems Taylor, as President as aforesaid, if any, of additional papers to be included in the Record.

20. Statement of points upon which defendant-appellant
474 intends to rely upon the appeal herein.

21. Stipulation as to the record.

22. Clerk's certificate.

Dated, New York, N. Y., March 7, 1947.

Designation of Contents of Record by Defendant-Appellant

Yours &c.,

475

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant,
Henry M. Propper, as Receiver, &c.
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

HON. JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Plaintiff-Appellee,
United States Courthouse,
Foley Square,
New York, N. Y.

476

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y.

477

Supplemental Designation

UNITED STATES DISTRICT COURT

478 SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

479 DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

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480 Appellee, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, plaintiff in the above entitled action, designates the following matter to be included in the Record on Appeal in addition to the matters designated by the appellant, Henry M. Propper, on March 7, 1947.

Supplemental Designation

1. Order of substitution, substituting Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, for James E. Markham, the Alien Property Custodian, as plaintiff, dated November 1st, 1946. 481

Dated, New York, N. Y., March 14, 1947

JOHN F. X. McGOHEY,
United States Attorney,
Attorney for Plaintiff-Appellee,
United States Courthouse,
Foley Square,
New York, N. Y. 482

To:

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant,
Henry M. Propper, as Receiver, &c.,
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y. 483

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

484 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated
485 association of more than seven members,

Defendant,

—and—

HENRY M. POPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

486 The Appellant states that the Points upon which he intends to rely on the appeal in this action are as follows:

1. Under the express provisions of Section 977-b, Defendant Receiver had divested A. K. M. of all right, title and interest, legal and equitable, in and to the subject of the action and the cause of action by the *ante bellum* proceedings in the Sobotka action. Such property, therefore, could not be subject to subsequent seizure by the Alien Property Custodian as the property of A. K. M.

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

2. The New York Supreme Court has acquired exclusive possession of and sole jurisdiction over the *res* herein under the *ante bellum* proceedings in the Sobotka action pursuant to statute. The New York Court's administration of the *res* cannot be interfered with by a subsequent claim of the Alien Property Custodian whose rights, if any, may be asserted by filing a claim with Defendant Receiver. 487

3. The rights and title of the Receiver and the rights of A. K. M.'s creditors who filed claims in the proceedings in the *Sobotka* action were not affected by Executive Order 8389. 488

(a) The rights and title vested in the Receiver prior to the effective date of Executive Order 8389 and could not be affected by such order.

(b) Even if the title of the Receiver were acquired subsequent to Executive Order No. 8389, it was not affected by said Order.

(c) Executive Order 8389 was not intended to, and does not, forbid or otherwise interfere with the functions of the State Courts or with any action for the recovery of moneys or property owing by A. S. C. A. P. to A. K. M. instituted by the defendant Propper as Receiver of A. K. M. 489

(d) Both Congress and the Executive have recognized the validity of the foregoing.

4. This action by Plaintiff Custodian and the judgment under review necessarily involve

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

490 (a) a denial of full faith and credit of the statutes and judicial proceedings of the State of New York, and

(b) a deprivation of vested rights in property without compensation in violation of the United States Constitution.

Therefore this action should be dismissed.

5. Upon the admitted facts presented by the pleadings and the undisputed documentary proofs of Public Record, there is a total lack of any basis for any cause of action
491 by the Plaintiff against the Defendant Receiver. Count 2 of the complaint must be dismissed.

(a) The very nature of the Custodian's action necessarily requests a determination of the Court of the legal effect of its so-called vesting order and the rights of the parties.

(b) There was no seizure whatsoever here in any way creating any rights in Plaintiff Custodian or any obligation on the part of Defendant Receiver.

492 (c) Any seizure with respect to the subject of the action would under the very terms of the Custodian's Order #2097 be limited only to the balance remaining in the hands of Defendant Receiver upon distribution under Subdivision 16 of Section 977-b by the New York Court.

6. Every consideration of public policy, law and justice requires the dismissal of the action.

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

Dated, New York, N. Y., March 10, 1947. 493

Yours &c.,

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant,
Henry M. Propper, as Receiver, &c.,
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

To: 494

HON. JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Plaintiff-Appellee,
United States Courthouse,
Foley Square,
New York, N. Y.

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., &c.,
1450 Broadway,
New York, N. Y. 495

Stipulation as to Record

UNITED STATES DISTRICT COURT

496

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

It is hereby stipulated and agreed that the foregoing is a true transcript of the Record of the said District Court in the above entitled matter, as agreed upon by the parties.

Dated, New York, New York, April , 1947.

497

A. WALTER SOCOLOW
Attorney for Defendant-Appellant Henry M. Propper, as Receiver of the Property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.

JOHN F. X. MCGOHEY
Attorney for Plaintiff-Appellee Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

498

SCHWARTZ & FROHLICH
Attorney for Defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members.

Clerk's Certificate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

499

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the transcript of the printed record of the said District Court in the above entitled matter as agreed on by the parties. 500

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of April in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the said United States, the one hundred and seventy-first.

WILLIAM V. CONNELL,
Clerk.

501

[SEAL]